Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1997

JOYCE OLDFATHER, individually and as Representative of a Bondholder Class; and EDWIN BERTRAND, individually and as a Representative of a Bondholder Class,

Petitioners,

v.

CIGNA INSURANCE COMPANY, f/k/a Underwriters Insurance Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's cavalier rejection of coverage under a professional liability "tail" endorsement to federal and state securities law claims made against attorney Robert Blattner, which arose out of Blattner's "acts, errors or omissions" as lead bond counsel on two multi-million dollar bond projects, causing thousands of bondholders to lose tens of millions of dollars in investments, was legally adequate to reverse the District Court's detailed finding in favor of coverage.

LIST OF PARTIES

A. Joyce I. Oldfather, petitioner, is a resident of the State of Arizona. Pursuant to an order of the U.S. District Court for the District of Arizona in Case No. CIV 86-1968 dated August 18, 1988, Oldfather was certified as a class representative pursuant to Fed.R.Civ.P. 23. Oldfather brings this action as assignee of Robert A. Blattner and Blattner's excess professional liability insurance carrier, Old Republic Insurance Company, pursuant to a settlement reached in Case No. CIV 86-1968 dated March 20, 1991.

B. Edwin Bertrand, petitioner, is a resident of the State of Arizona. Pursuant to an order of the U.S. District Court for the District of Arizona in Case No. CIV 89-1087 PHX RCB dated October 10, 1990, Bertrand was certified as a class representative pursuant to Fed.R.Civ.P. 23. Bertrand brings this action as assignee of Robert A. Blattner and Blattner's excess professional liability insurance carrier, Old Republic Insurance Company, pursuant to a settlement reached in Case No. CIV 89-1087 PHX RCB dated March 20, 1991.

C. CIGNA Insurance Company (f/k/a INA Underwriters Insurance Company), respondent, is an insurance corporation organized and existing under the laws of California with its principal place of business in Woodland Hills, California. CIGNA has an ultimate parent company, CIGNA Corporation, which issues shares registered with the Securities and Exchange Commission for public trading. There are no other parent companies, subsidiaries or affiliates of CIGNA Insurance Company which issue shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported pursuant to Ninth Circuit Rule 36-3 and is included in the appendix at App. 1-5. The opinion of the District Court is also not reported and is included in the appendix at App. 6-46.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1997. (App. 1) A petition for rehearing was denied on May 21, 1997. (App. 47) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF CASE

A. Nature Of The Case

At issue is a $15 million claims-made Lawyers Professional Liability Policy endorsed to provide $5 million in "tail" coverage sold by INA Underwriters Insurance Company ("CIGNA") to the Guren, Merritt, Feibel, Sogg & Cohen ("Guren Merritt") law firm and one of its partners, Robert A. Blattner ("Blattner").[1] The District Court (Muecke, J.) in a lengthy and detailed opinion granted petitioners summary judgment on the issue of coverage under the tail endorsement for the settlement of two multi-million dollar class action securities fraud suits known as *Sun Mesa* and *Chandler*.

Following a random reassignment of the case in the

---

[1] As required in Supreme Court Rule 14, the basis for federal jurisdiction is 28 U.S.C. §1332(a)(1) in that the parties are of diverse citizenship and that the matter in controversy exceeds $75,000, exclusive of interest and costs.

District Court to a new judge, the District Court (Silver, J.) subsequently *sua sponte* certified the issue of coverage to the Ninth Circuit under 28 U.S.C. §1292, expressing a view contrary to the prior presiding district court judge as to the meaning and effect of the tail endorsement. The Ninth Circuit, in a five-page unpublished memorandum decision, thereafter reversed the District Court's entry of summary judgment in petitioners' favor and granted the respondent's cross motion for summary judgment on the issue of coverage.

The dispositive coverage issue as framed by the parties in the District Court and as acknowledged by the Ninth Circuit "is whether [Blattner] committed an 'act, error or omission' which triggered coverage under the Guren, Merritt policy." The District Court found that the plain and ordinary meaning of the tail unambiguously applied to afford coverage for the $23 million combined settlements Blattner entered into to resolve his personal exposure in the *Sun Mesa* and *Chandler* claims, because those claims did in fact "arise out of [Blattner's] acts, errors or omissions" at Guren Merritt. Alternatively, the language in CIGNA's policy was found by the District Court to be ambiguous as applied to these claims, resulting in a finding of coverage.

In reversing the District Court, the Ninth Circuit without reference or citation to any controlling case law authority, reversed the District Court and granted summary judgment in favor of respondent. In so ruling, the Ninth Circuit nullified the very purpose of the tail endorsement in the professional liability policy at issue, robbing the intended beneficiaries—thousands of underlying bondholder plaintiffs who were damaged by Blattner's negligence—of at least $5 million in benefits due under that contract.

B. The Policy

The CIGNA professional liability insurance policy, No.

LEO 02 46 22, issued to Guren Merritt for the period November 1, 1983 to November 1, 1984 provided $15 million in "claims-made"[2] coverage to the firm and its individual lawyers for "damages as a result of claims first made against the [insured] by reason of any act, error or omission in professional services rendered" for others. (CR 181, Ex. 1; Tab 1)[3]

On or about June 1, 1984, the Guren Merritt firm dissolved. Upon dissolution, the firm purchased from CIGNA an extended discovery endorsement providing "tail" coverage with limits of liability of $5 million dollars at an additional fixed cost of 225% of the basic premium for the original policy. (Tab 1, end. 7) The terms of this tail endorsement provided:

EXTENDED DISCOVERY PERIOD ENDORSEMENT

(Lawyers Professional Liability Insurance)

In consideration of the additional premium charged, it is agreed that:

---

[2] As recognized by this Court in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 n.3, 98 S.Ct. 2923, 2926, n.3, 57 L.Ed. 2d 932 (1978), claims-made policies protect the insured only against claims made during the life of the policy. Such policies were expressly developed to deal with situations where the acts, errors, or omissions are difficult to pinpoint in time and occur over an extended period. *See, Stine v. Continental Cas. Co.*, 419 Mich. 89, 349 N.W.2d 127, 131 (1984).

[3] Hereinafter all citations to "Tab ___" refer to the exhibits and supplemental exhibits submitted in support of the Petitioners' Motion for Partial Summary Judgment filed in the District Court and docketed at Clerk's Record Nos. 181 and 223, unless otherwise indicated. All "Tab" references refer to the location of the supporting document(s) from the Clerk's Record as found in Appellant's or Appellees' excerpts of record as filed in the Ninth Circuit record. The Appellant's Excerpts of Record ends at Tab 30 and the Appellees' Supplemental Excerpts of Record begins at Tab 31.

1. Coverage will be provided according to the applicable terms, conditions and exclusions of this policy for all claims first made after the termination of the Policy period, **arising out of any act, error, or omission** in rendering professional services for others in the Insured's capacity as a lawyer, which took place prior to the end of the Policy period and are otherwise covered by the Policy. (emphasis supplied.)

(App. 48)

Significantly, neither the policy nor the tail endorsement defined the words within "act, error or omission" clause.

C. The Class Action Lawsuits

In November 1986, the United Bank of Arizona, as trustee for bondholders of industrial revenue bonds issued by the Industrial Development Authority of the City of Mesa, Arizona, instituted suit in the United States District Court, District of Arizona, against Blattner, his then current law firm, Benesch, Friedlander, Copeland & Arnoff ("Benesch"), all of the individual Benesch partners, and others arising out of the default on the bonds issued to finance the Sun Mesa Health Care Facility (the "*Sun Mesa*" case). (CR 1; Tabs 7-8) A similar lawsuit was filed against essentially the same group of defendants, including Benesch and Blattner, arising out of the default of bonds issued by the Industrial Development Authority of the City of Chandler, Arizona to finance the Chandler Manor Health Care Facility (the "*Chandler*" case). (CR 1; Tab 14)

The class members in these actions consisted of more than 3,200 investors in the Sun Mesa and Chandler Manor industrial revenue bonds who lost in excess of $50 million in total return on investments when the projects were unable to proceed as marketed and the bonds defaulted. Because of its dissolution, Guren Merritt was not named a defendant in either of the underlying cases.

Blattner was lead bond counsel on both bond projects. Blattner's work on the two bond projects spanned a period of eight to ten months. He began his work on the projects while at Guren Merritt and completed that work at the Benesch firm where Blattner moved to at or about the time of dissolution of the Guren Merritt firm.

The basic thrust of the *Sun Mesa* and *Chandler* suits as it pertained to Blattner was his alleged breaches of duties of care owed as lead bond counsel to the investing public. This included, *inter alia,* his failure to determine the projects' need for and the failure to obtain life care permits as required by Arizona law necessary to the projects operation.

At the time the *Sun Mesa* suit was served in March, 1987, the Benesch firm was insured under a $5 million dollar professional liability policy issued by Pacific Employers Insurance Company ("Pacific"), also a CIGNA affiliated company. (Tab 31) Benesch was also insured by a $5 million dollar excess insurance policy issued by Old Republic Insurance Company. (CR 296, Ex. 16; Tab 21)

Pacific retained the Phoenix, Arizona law firm of Jennings, Strouss & Salmon ("JS&S") to defend Blattner and the other Benesch partners named in both the *Sun Mesa* and *Chandler* cases. (Tab 32) On May 20, 1987, only one month into their representation, JS&S's senior partner concluded that the *Sun Mesa* and *Chandler* cases presented an exposure of at least $28.5 million to Blattner and the Benesch firm, an amount well in excess of Benesch's combined $10 million primary and excess professional liability insurance limits. (Tab 33)

1. Blattner's Request For Coverage Under The Guren Merritt Tail Policy

By letter dated May 25, 1988, less than a year after service of the *Sun Mesa* and *Chandler* cases upon the Benesch

firm, Blattner's law partner at Benesch, David Schaefer, acting on Blattner's behalf and on behalf of current other Benesch partners who were former partners in the Guren Merritt firm, sent a certified letter to JS&S enclosing a copy of the Guren Merritt policy.[4] Schaefer's letter stated:

> As I am sure you know, Bob Blattner was a partner, and Deanna Kursh was an associate, at the Guren, Merritt firm when the work commenced that has led to the [*Sun Mesa* and *Chandler*] litigations. When Guren, Merritt dissolved, the former Guren, Merritt partners purchased a tail from INA.
>
> Enclosed is a copy of the policy and the Extended Discovery Period Endorsement. It seems to me that this policy provides additional coverage to the former Guren, Merritt partners, now Benesch, Friedlander partners, who have been named in the captioned litigations.

(Tab 9)

By letter dated June 8, 1988, JS&S forwarded Schaefer's letter to CIGNA. (Tab 10) In a letter dated June 23, 1988, CIGNA responded to Schaefer's May 25, 1988 letter, stating:

> Specifically, your attention is directed to endorsement number seven which provides coverage for those acts which took place prior to the end of the policy period and were caused by the insured . . . . Therefore, in order for their [sic] to be coverage under the extended discovery period endorsement, the act must occur prior to the expiration of the policy period on November 11, 1984 [sic].

---

[4] Schaefer was formerly a law partner of Blattner's at the Guren Merritt firm. (Tab 34). Schaefer also had an interest in seeing that CIGNA afforded the $5 million in additional coverage due under the Guren Merritt tail because, he, like all Benesch partners, had been sued in *Sun Mesa* and *Chandler* in his individual capacity and was therefore personally exposed to a judgment in excess of Benesch's available insurance coverage.

(Tab 11) Thereafter, by letter dated September 13, 1988, Schaefer responded to requests for information contained in CIGNA's June 23 letter, providing CIGNA with an overview of Guren Merritt's retention on the bond projects and Blattner's legal work while at Guren Merritt. (Tab 12)

2. CIGNA's Alleged One-Year "Investigation" Of Coverage Under The Guren Merritt Tail

During the next year, from September 1988 to September 1989, CIGNA allegedly "investigated" Blattner's claim for coverage under the Guren Merritt tail. Yet, during this one year period, CIGNA never advised Blattner of its position on coverage. (Tab 35)

3. CIGNA's Denial Of Coverage Under The Tail

On September 18, 1989, one and one-half years after coverage was first requested on his behalf, and a year after Schaefer provided CIGNA the requested explanation of Guren Merritt's retention on the projects, CIGNA denied coverage to Blattner for the *Sun Mesa* and *Chandler* claims. The sole basis given for this denial was:

> The documents filed to date to [sic] not allege any act, error or omission by Mr. Blattner while he was employed by Guren, Merritt. Moreover, discovery to date, does not reveal any allege [sic] act, error or omission which occurred by Mr. Blattner [sic] during his employment with Guren, Merritt. Thus, we will not be providing coverage to Mr. Blattner. . .

(Tab 15)

4. What CIGNA Would Have Found If It Had Conducted A Meaningful Investigation Of Coverage Under The Tail

As the District Court recognized, contrary to CIGNA's stated basis for its denial of coverage, Blattner was engaged in far more than simply preliminary non-substantive activities on the bond projects while at the Guren Merritt

firm. Indeed, as alleged by plaintiffs in the *Sun Mesa* and *Chandler* suits, the scheme to defraud investors was "hatched" while Blattner was at Guren Merritt. The concept of the Sun Mesa and Chandler bond projects, the decision to go forward with the projects (including seeking the issuances of the necessary bonds), and the basic work necessary to proceed with the projects and the bond issuances all began in approximately early November 1983, while Blattner was at Guren Merritt.

The record available to CIGNA when it denied coverage to Blattner under the tail established the following facts regarding Blattner's work on the projects while at Guren Merritt:

- Blattner was one of the first members of the Sun Mesa/Chandler Working Group, which was formed in late 1983. The Working Group assisted in preparing the Official Statements ("O.S.") for both projects. (Tab 37)
- The O.S.s were prepared by having each Working Group member provide information to co-bond counsel, Tommy Furby, who then assembled a draft of the Preliminary O.S. ("P.O.S."). The P.O.S. was then reviewed by the entire Working Group, paragraph by paragraph, to see that the P.O.S. was complete and accurate. This review was accomplished primarily at the Working Group's due diligence meetings which Blattner chaired. (*Id.*)
- Blattner decided when to hold the due diligence meetings. Blattner also assumed the leadership role at these due diligence meetings. (Tab 40) By February 14, 1984, Blattner was assembling the P.O.S. (Tab 41) On February 22-23, 1984, the Working Group had its initial due diligence meeting, during which the members discussed, *inter alia*, the drafting of the P.O.S. (Tab 42) The Working Group met again to discuss the projects on February 28, 1984. (Tab 43)

- On March 15, 1984, all members of the Working Group received copies of a draft feasibility study regarding the projects for their review and comment. (Tab 44) The feasibility study was an integral part of the O.S.s and at no time did any version of the O.S.s or the feasibility studies make any mention of the projects' need for a life care permit under Arizona law. (Tab 45)
- Blattner had knowledge of the life care permit requirement while he was at Guren Merritt and while he led the due diligence meetings in early 1984. As of March 6-8, 1984, the feasibility consultant for the Working Group, May Zima, and Blattner's Arizona local counsel, Rick Clark and Clark's associate Gary Drummond, acknowledged the need for a life care permit in relation to the projects. (Tab 46)
- On March 8, 1984, Blattner called Drummond and asked for a copy of Arizona's life care statutes, which Drummond sent to Blattner at Guren Merritt on March 14, 1984. (Tab 47) At this time, Drummond also discussed with Blattner the "general working" of Arizona's life care statutes. (Tab 48) Blattner requested information concerning the life care statutes in order to help the developers make decisions as to the nature of the projects' operations. (Tab 47) Blattner discussed with Arizona local counsel the issue of what permits the projects required under Arizona law because, according to Blattner, it was important: "It was necessary to have proper permits prior to closing." (Tab 49)
- At least as of March 15, 1984 (while Blattner was at Guren Merritt), the Sun Mesa and Chandler projects clearly were life care facilities. During March 6-8, 1984, local counsel and the feasibility consultant acknowledged that fact. (Tab 46) On March 15, 1984, Drummond finalized the Residence Agreement (the contract that the projects' elderly residents would sign upon admission) for both projects. (Tab 38) That Residence Agreement was, in fact, a life care contract

and was never changed from being a life care contract, and was to be used by both projects. (Tab 50)

- On March 16, 1984, that Residence Agreement was submitted at Blattner's direction to the Internal Revenue Service as part of the required information for the projects' applications for tax-exempt, non-profit status. (Tab 51) On March 8, 1984, Blattner discussed the IRS application with Arizona local counsel. (Tab 52) Blattner and other Guren Merritt attorneys under his supervision reviewed the IRS applications for accuracy prior to their submission. (Tab 53)
- Blattner and others at Guren Merritt prepared the applications to the municipal bond issuing authorities (the Mesa and Chandlers IDAs) and prepared most of the necessary supporting documentation while at Guren Merritt. (Tab 54) These applications failed to disclose that the projects required life care permits. (Tab 55)[5]
- Sometime during the last week of March 1984, Blattner and his associate, Deanna Kursh, left Guren Merritt and joined the Benesch firm. (Tab 56) Blattner and Kursh took the Sun Mesa/Chandler project work with them to Benesch and completed their work on the projects at the Benesch firm. The bond projects closed thereafter.
- The combined total fees billed and paid to Blattner for his legal work in connection with both bond projects while at Guren Merritt and Benesch Friedlander was $100,000. Of this amount, $20,000 was paid to Guren Merritt. (Tab 57)

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[5] The defendants in the *Sun Mesa* case acknowledged that the work performed by Blattner and others as early as January 1984 on the IDA applications was the earliest actionable conduct for purposes of determining whether defendants' conduct met the "substantial time period" requirement for federal R.I.C.O. claims. (Tab 39, Order at 5-6).

5. Judge Muecke's Denial Of Summary Judgment In *Sun Mesa* And The Resulting Settlement

Significantly, Judge Muecke, the District Court judge who authored the 40 page opinion granting petitioners' partial summary judgment motion on coverage, was also intimately familiar with the facts of the underlying *Sun Mesa* case. Judge Muecke also presided over that case, ultimately approving the settlement of *Sun Mesa* and the *Chandler* case as well.

On January 4, 1991, Judge Muecke denied summary judgment to Blattner and the Benesch firm in the *Sun Mesa* case. (Tab 39) Basic to his denial of summary judgment was the fact that Blattner received copies of the Arizona Life Care Statutes while at Guren Merritt but did nothing with them. (Tab 39, Order at 16-18) Further, Judge Muecke found a triable issue of fact existed as to whether the Official Statement's failure to mention the life care permit requirement was a material omission. Judge Muecke also found the fact that Blattner's billing statements and the billing statements of Blattner's local Arizona counsel contained numerous entries for conferences from November 1983 through late March 1984 while Blattner was at Guren Merritt raised a triable issue of fact as to whether the plaintiffs met the "substantial time period" requirement to support the plaintiffs' federal R.I.C.O. claims. (Tab 39, Order at 5-6) Judge Muecke further found in *Sun Mesa* that the review of the IRS applications for accuracy prior to their submission by Blattner and the other Guren Merritt attorneys was sufficient to raise a triable issue of fact as to whether the projects' tax exempt status were fraudulently obtained. (Tab 39, Order at 3) As Judge Muecke recognized, "[d]efendants were apparently contemplating life care when they applied for tax exempt status" at the time when Blattner was a Guren Merritt partner. (*Id.*)

6. Blattner's Settlement Of The *Sun Mesa* And *Chandler* Cases

Trial was set to begin in the *Sun Mesa* case in April, 1991. CIGNA and its defense counsel, JS&S, had concluded that the *Sun Mesa* and *Chandler* cases presented a monumental exposure to Blattner and the other Benesch partners. Indeed, even before Blattner lost the summary judgment motion in *Sun Mesa*, JS&S had already concluded that:

> One important aspect of these cases is the timing of the litigation. As everyone in this country is aware, with the savings and loan industry 'crisis,' . . . one can hardly think of a better time in history for the plaintiffs to have this litigation pending. . . .
>
> Plaintiffs' counsel has estimated that the approximate present amount of unpaid principal and interest comes close to $45,000,000. If the plaintiffs successfully prove their civil racketeering claims, the damage award would be trebled, thus resulting in potential exposure of approximately $150,000,000.
>
> . . . we would anticipate or assume that jurors biases and prejudices would be negative as they pertain to the attorney defendants. Therefore, there exist real and substantial risks that trial of this case could result in verdicts and judgments against the Benesch law firm and it [sic] individual partners in amounts which we have outlined above.

(Tab 69)

On March 20, 1991, the eve of a specially consolidated pretrial settlement conference in *Sun Mesa* and *Chandler* before Judge Muecke, the claims against Blattner and Benesch were settled. (Tab 20) The settlement with Blattner and Benesch was without CIGNA's participation under the Guren Merritt tail and entered into pursuant to the procedure sanctioned by the Arizona Supreme Court in *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (Ariz. 1969).

The settlement was also conditioned upon Judge Muecke's good faith approval pursuant to Fed. R. Civ. P. 23. Judge Muecke later approved of the *Damron* settlement on May 9, 1991. (CR 259; Tab 70)

As part of that settlement, Pacific and Old Republic each agreed to pay to plaintiffs classes their respective policy limits, a combined sum of nearly $10 million. In return, Blattner agreed to the entry of two judgments against him personally in the total amount of $23,714,346, representing the still outstanding principal and interest balance of the defaulted *Sun Mesa* and *Chandler* bonds, less deductions for settlements reached by the bondholder plaintiffs with other parties.

Pursuant to *Damron*, Blattner then assigned his rights under the Guren Merritt tail to the plaintiffs classes. Old Republic also assigned to the plaintiffs classes its equitable subrogation claims against CIGNA arising out of CIGNA's failure to settle under the tail. Finally, Old Republic also agreed at plaintiffs' request to undertake the prosecution of this action at its expense, in return for which Old Republic would share in any recovery.

7. CIGNA's Post-Settlement Agreement To Defend Blattner

Thereafter, in a bizarre twist, on March 25, 1991, just days after having refused to participate in the settlement, CIGNA sent a letter to Blattner agreeing to defend him in the *Sun Mesa* and *Chandler* cases under the Guren Merritt policy. CIGNA's letter stated:

> A defense will be provided to you [under the Guren, Merritt policy] in the *Sun Mesa* and *Chandler* Manor class actions. The defense is being provided now, even though you have never requested it, because Pacific Employers will no longer be defending.

(Tab 71)

Because the *Sun Mesa* and *Chandler* cases had already been settled, this post-settlement grant of defense raised the obvious question: What "defense" was being provided?

D. The District Court Proceedings

On May 17, 1993, the petitioners moved for partial summary judgment on coverage in the District Court. The respondents filed a cross motion for summary judgment on the same issue. On June 22, 1994, Judge Muecke issued a 40 page opinion setting forth detailed findings of fact and conclusions of law in which he found that the plain and ordinary meaning of the "tail" endorsement to the CIGNA policy unambiguously applied to afford coverage to Blattner for the *Sun Mesa* and *Chandler* claims because those claims "arose out of" his "acts, errors or omissions" at both Guren Merritt and Benesch. (App. 6-46). Alternatively, the language in CIGNA's policy was found to be ambiguous as applied to these claims. (App. 42-46). Thereafter, on October 7, 1994, Judge Muecke denied CIGNA's motion to certify this ruling to the Ninth Circuit for interlocutory appeal.

Shortly after Judge Muecke's summary judgment ruling, on November 4, 1994, this case was randomly reassigned to the Honorable Roslyn O. Silver. One year later, after presiding over a number of substantive motions directed at the balance of petitioners' claims, and after establishing a pretrial order submission date and trial schedule, on November 28, 1995, Judge Silver *sua sponte* reversed Judge Muecke's prior order denying certification of the coverage issue for interlocutory appeal and granted certification of the issue for appeal to the Ninth Circuit. Judge Silver also stayed all remaining proceedings in the District Court.

E. The Court Of Appeals Proceedings

On April 22, 1997, in a five page opinion devoid of a single citation to case law authority, the Ninth Circuit reversed the District Court's detailed summary judgment

ruling in favor of petitioners and granted CIGNA's cross-motion for partial summary judgment. The Ninth Circuit held that absent some "liability-creating act, error or omission while at the Guren firm, the bondholders simply have no claim." (App. 4) The Ninth Circuit held that "[t]he complaint failed to identify any conduct by Blattner that created liability under Guren's policy." (App. 3-4)

Thereafter, on May 21, 1997, the Ninth Circuit denied the petitioners' timely request for a rehearing on May 21, 1997. (App. 47)

REASONS FOR GRANTING THE PETITION

The issue before this Court is one of first impression, involving not only the rights of the more than 3,200 investors who were injured as a consequence of Blattner's professional negligence, but all clients of professionals practicing in inumerable professions who are insured under claims-made professional liability policies. This issue is of major national importance because of the vast sums of money involved in financial offerings to the public and the increasing instability of professional firms involved in those transactions. The resolution of this case will greatly impact how this and other professional liability insurers are required to apply tail coverage, for which insureds pay substantial additional premiums (here, a 225% added premium), for the benefit of parties injured by their professional negligence.

Indeed, by their very nature, tail endorsements to claims-made policies are in most instances purchased when professionals retire or change practices (here, following dissolution of a law firm) and are therefore the only viable asset available to a client injured by a professional's neg-

ligence.[6] The Ninth Circuit's interpretation and application of the tail endorsement language in this case was contrary to the basic premise underlying tail policies, that is to provide coverage for claims that "arise out of acts, errors or omissions" during the policy period. If the Ninth Circuit's opinion is upheld, it will have a substantial impact on the public which is to be protected by this coverage.

Accordingly, petitioners respectfully request this Court to review the Ninth Circuit's decision and grant this petition.

I.

THE NINTH CIRCUIT'S FIVE PAGE SUMMARY OPINION IN THIS COMPLEX INSURANCE AND SECURITIES FRAUD MATTER IS CONTRARY TO BASIC INSURANCE CONTRACT PRINCIPLES AND DENIES PETITIONERS THE INTENDED BENEFIT OF THE PROFESSIONAL LIABILITY POLICY AT ISSUE

A. The Language In The Endorsement Controls

The language in the "tail" endorsement controls as to whether there is coverage. It is basic to insurance contract construction that where an endorsement modifies the terms of the original policy, the endorsement controls. *Reserve Ins. Co. v. Staats*, 9 Ariz. App. 410, 453 P.2d 239, 241 (Ariz.

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[6] In the leading treatise, *Legal Malpractice* (3d Ed. 1989), the author (CIGNA's former lead counsel in the District Court) recognizes:

> The main disadvantage of the claims-made form is that it does not afford coverage after the policy expiration. Therefore, an attorney must renew or obtain coverage each year so that there is no gap in coverage. This can be troublesome for the attorney who retires, becomes a judge, becomes inactive, or otherwise discontinues the practice of law. Most insurers, for a price, will provide an endorsement extending coverage for such circumstances. . . This is commonly known as extended reporting endorsement or 'tail' coverage.

Mallen and Smith, *Legal Malpractice*, §28.11, p.745.

App. 1969).[7] Any conflict which exists between the original policy and an endorsement must be resolved in favor of the language of the endorsement. *Exchange Ins. Co. v. Mar-Fran Enterprises, Inc.*, 169 Ariz. 187, 818 P.2d 172 (Ariz. App. 1991); see also, *Couch on Insurance 2d* (Rev. ed) §4:36 ("As the endorsement is later in time, it should prevail over any conflicting provision of the policy."). It is an equally fundamental principle of Arizona insurance law that, if an insurer desires to limit its liability under a policy, it should employ language which clearly and distinctly communicates to the insured the nature of the limitation. *Coconino County v. Fund Administrators. Ass'n.*, 149 Ariz. 427, 431, 719 P.2d 693 (Ariz. App. 1986).

Because none of the terms in the tail were defined in CIGNA's policy, the Ninth Circuit was required, yet failed, to engage in an analysis of case law on insurance contract construction as it relates to the broad insuring terms used therein.

B. Construction Of The Phrase "Arising Out Of"

As the Ninth Circuit itself has previously recognized, the phrase "arising out of" in an insurance policy provision describing the scope of coverage is extremely broad. *Continental Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985). Here, the "arising out of" language appeared in the policy's basic coverage grant, and is therefore to be interpreted broadly to effectuate the purpose of the policy. *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 694 P.2d 181, 185-86 (1984).

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[7] The parties are in agreement that Arizona law governs in this diversity case. The District Court accordingly analyzed the question of coverage under Arizona state substantive law. Based upon the absence of any citation to authority in its decision, the Ninth Circuit apparently applied no law of any jurisdiction in its decision.

The phrase "arising out of" has been construed by Arizona courts to merely require some causal relationship. "Causal" is not to be confused (as the Ninth Circuit apparently did) with notions of legal proximate cause. *Farmers Ins. Co. v. Till*, 170 Ariz. 429, 825 P.2d 954, 955 (Ariz. App. 1991) ("in an insurance policy, the words 'arising out of' are 'broad, general and comprehensive terms effecting broad coverage'"); *Love v. Farmers Ins. Group*, 121 Ariz. 71, 588 P.2d 364, 367 (Ariz. App. 1978). *See also, e.g., Southeastern Fidelity Ins. Co. v. Stevens*, 142 Ga. App. 562, 236 S.E.2d 550, 551 (Ga. App. 1977) ("The term 'arising out of' does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused . . . (a)lmost any causal connection or relationship will do.") In other words, due to CIGNA's use of the broad phrase "arising out of" in the tail endorsement, for coverage to exist it is not necessary that the claims in *Sun Mesa* and *Chandler* were directly or proximately caused in the strict legal sense by Blattner's "acts, errors or omissions" at Guren Merritt. Rather, any causal connection suffices to establish coverage.

C. Definition Of "Acts, Errors Or Omissions"

As Judge Muecke found in the District Court, the plain meaning of the broad undefined words "acts, errors or omissions" in the tail require only a showing of "an activity in process of completion" or a "thing being done." *See, Arizona Property & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451, 456 (1987) (ordinary meaning of undefined words in an insurance policy are to be derived from dictionary definitions.) The claims that were made against Blattner in *Sun Mesa* and *Chandler* undeniably "originated out of" or "flowed from" or were "incident to" things done or in the process of being done by Blattner at

the Guren Merritt firm.[8]

D. The Underlying Complaints Identified Acts Committed By Blattner While He Was At Guren Merritt Out Of Which The *Sun Mesa* And *Chandler* Claims Arose

As described in the Statement of the Case, there is an abundance of evidence of Blattner's acts out of which the *Sun Mesa* and *Chandler* cases arose while at Guren Merritt that support the District Court's finding of coverage under the tail endorsement. Notwithstanding this evidence, the Ninth Circuit held that the *Sun Mesa* and *Chandler* complaints failed to identify any conduct by Blattner that "created any liability" under Guren Merritt's policy. The Ninth Circuit failed to consider numerous allegations in the underlying complaints.

At page 88 of the *Sun Mesa* complaint, the following pertinent allegations against Blattner relating to conduct while he was at Guren Merritt as well as Benesch appear:

> 173.
>
> * * *
>
> Benesch[9], through its members, was involved from the

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[8] As summarized in Windt, *Insurance Claims and Disputes* (Shepard's/McGraw-Hill, 1995 3d ed.) §11.04, what event under an insurance policy happens to trigger coverage is not determined by tort law principles or even by logic, but rather by what the particular insurance contract provides. *See, generally, Allstate Ins. Co. v. Smiley*, 276 Ill.App.3d 971, 659 N.E. 2d 1345, 1353-54 (Ill. App. 2d Dist. 1995) (explaining that to hold that there can be no coverage unless automobile-related negligence was the sole proximate cause of the injury is to confuse tort principles with principles governing contract interpretation).

[9] While it is correct that the referenced allegations speak in terms of both Blattner and the Benesch firm, it is an uncontroverted fact that Blattner's conduct at the "inception of the Project

(continued...)

inception of the Project and was uniquely placed in a role that allowed it to gather information from the participants, accountants, and other parties such that Benesch had an overall view and understanding of the entire Project and the sale of the Bonds. Benesch, at all materials times, had a duty to the investing public to make sure that the information passed on to the investing public was accurate and truthful and to take appropriate steps to assure that the investing public and the tax-exempt bond market was not misled by the placement of the Bonds in the tax-exempt bond market.

174. Robert Blattner involved Benesch with regard to the original application to the IDA for approval to sell the Bonds and, as a lawyer with Benesch, involved Benesch in the amended application. Blattner also participated in various meetings with the principals and other counsel, as set forth above, allegedly for the purpose of satisfying "due diligence requirements." Of necessity, these meetings required the discussion of the legal requirements for the sale of the Bonds, the validity and taxability issues. In fact Blattner received copies of the Arizona statutes dealing with the necessity of life care permits on life care contracts.[10] Blattner also received additional information concerning the Department of Insurance requirements and was intimately involved in the preparations and dissemination of the Official Statement. Benesch, through Blattner, upon information and belief, analyzed existing Arizona

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[9] (...continued)

(*e.g.* ¶173) took place while he was a partner in the Guren firm and that Blattner's application to the IDA also occurred while he was a partner in the Guren firm." (*See* C.R. 181 Ex. 51; ER Tab 55). *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 509 P.2d 222, 224 (1973) (insurer's duty to defend depends on actual facts and not solely upon the allegations in the pleading).

[10] It has also been demonstrated that Blattner received this information while at the Guren Merritt firm. (C.R. 181 Ex 21; E.R. Tab 39).

law in connection with the development of the Official Statement and the sale of the bonds and by assuming this role assumed the duties of an attorney admitted to practice in the State of Arizona. In fulfilling these duties, Blattner and Benesch were negligent, reckless and intentionally disregarded the existence and application of Arizona law to the development of the *Sun Mesa* Project and the sale of the Bonds.

175. Benesch, in connection with the Project, rendered legal opinions as bond counsel which were necessary in order for the Bonds to be sold. Benesch acted in concert with other counsel and was of the opinion that the bonds and related documents were enforceable. This opinion was misleading in failing to disclose the serious but questionable validity and enforceability of the bonds and related documentation. Benesch failed to disclose that the revenue producing capability of the Project was seriously in jeopardy and that any steps taken to secure life care contracts without a permit would be illegal and that any revenues generated in that fashion would be illegal. Since the Project could only pay Bondholders through revenues or security in the Project, any other source of funds, other than the Guaranty, could potentially effect the issuance of the Bonds, the validity of the Bonds and enforceability of related documents, and the tax-exempt status of the Bonds.

Similarly, the second filed *Sun Mesa* complaint (C.R.1. Ex. B p.13; E.R. Tab 8) asserted the following relevant allegations regarding Blattner's Guren Merritt conduct from late 1983 to March 1984:

Part A: THE SCHEME

35. Beginning in 1983 and 1984, acting singly and in concert, the defendants engaged in a fraudulent common plan, scheme, conspiracy, or course of conduct of which an essential element was the sale by deception of bonds to members of the investing public. The fraudulent common plan, scheme, artifice, conspiracy, or course of conduct is referred to as the "scheme." Pursu-

> ant to the scheme, defendants, knowingly or in reckless disregard, employed devices, schemes, and artifices to defraud; engaged in acts and practices in courses of business which operated as a fraud upon the bondholders and knowingly conspired to bring securities onto the market which were not entitled to be marketed, intending to defraud purchasers; knowingly or in reckless disregard, made untrue statements of materials facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The defendants, knowing of the primary violations, also rendered substantial assistance to the schemes knowing of their role in the scheme. The bondholders reasonably relied on the availability of the bonds in the market as an indication of their apparent genuineness. As a result of the scheme, the bondholders were damaged.

As in the *Sun Mesa* case, the *Chandler Manor* suit also alleged a scheme to defraud investors beginning in 1983 while Blattner was at Guren Merritt (C.R.1. Ex. C p. 15; E.R. Tab 14):

> Part A: THE SCHEME
>
> 35. Beginning in 1983, acting singly and in concert, the Defendants engaged in a fraudulent common plan, scheme, conspiracy, or course of conduct of which an essential element was the sale by deception of bonds to members of the investing public. The fraudulent common plan, scheme, artifice, conspiracy, or course of conduct is referred to as the "scheme." Pursuant to the scheme, Defendants, knowingly or in reckless disregard, employed devices, schemes, and artifices to defraud; engaged in acts and practices in courses of business which operated as a fraud upon the bondholders and knowingly conspired to bring securities onto the market which were not entitled to be marketed, intending to defraud purchasers; knowingly or in reckless disregard, made untrue statements of material facts and omitted to state material facts necessary in order to make the

> statements made, in light of the circumstances under which they were made, not misleading. The Defendants, knowing of the primary violations, also rendered substantial assistance to the schemes knowing of their role in the scheme. The bondholders reasonably relied on the availability of the bonds in the market as an indication of their apparent genuineness. As a result of the scheme, the bondholders were damaged.

Therefore, as alleged in both the *Sun Mesa* and *Chandler* complaints, Blattner as lead bond counsel rendered the essential assistance to the scheme from its inception, both at the Guren Merritt firm and later at Benesch. According to both complaints, it was "as a result of [that] scheme, the bondholders were damaged."

E. Blattner's "Liability-Creating" Acts Established Coverage Under The Tail Endorsement

Based upon the above allegations, Blattner's acts as alleged in the *Sun Mesa* and *Chandler* complaints were clearly sufficient to establish liability under the federal securities laws at the time Blattner settled the *Sun Mesa* and *Chandler* cases.[11] The most factually analogous case is *Cronin v. Midwestern Oklahoma Development Authority*, 619 F.2d 856 (10th Cir. 1980).

In *Cronin*, the Tenth Circuit vacated the trial court's summary judgment ruling and held that primary or aider/abettor liability for Rule 10(b)5 securities fraud could exist against original bond counsel even though bond counsel withdrew three weeks before the closing date. In so holding, the court rejected as erroneous the trial court's belief (the

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[11] Courts must apply the law applicable at the time the decision to deny coverage was made. *See, e.g., Baker v. Racansky*, 887 F.2d 183, 198 (9th Cir. 1989) (Ninth Circuit does not look to post-incident decisions to determine whether the law was then clearly established); *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985).

same as the Ninth Circuit's conclusion) that the basic element of the fraud was the actual bond sale or that the plaintiff must establish that the lawyer was privy to those acts, in order that the facts surrounding the issuance of the bonds, and the other background facts, could be fully developed at trial. 619 F.2d at 862.[12]

Other courts have also held that acts such as those by Blattner while at Guren Merritt support a finding of primary liability under the securities laws. In *In Re Software Toolworks, Inc.*, 50 F.3d 615, 628-29 (9th Cir. 1994), the Ninth Circuit reversed a summary judgment in favor of the defendant accountants and held that a secondary actor may be primarily liable under Section 10(b) even when the actor's alleged participation consisted mainly of drafting and editing an offering document. Similarly, in *Employers Ins. of Wausau v. Musick, Peeler, & Garrett*, 871 F. Supp. 381, 389 (S.D. Cal. 1994) the court rejected the defendant's argument that the securities claim must be dismissed because an accountant may only be primarily liable under Section 10(b) for statements made in reports certified by the accountant. The court noted that the defendants did not cite to any binding authority for this proposition and acknowledged "that most courts apply a much more flexible test" to determine if the professional was sufficiently involved in the offering to be considered a primary actor

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[12] *See also, Powell v. H.E.F. Partnership*, 835 F. Supp. 762, 766 (D.Vt. 1993) (where lawyers and accountants can reasonably foresee that third parties will rely on documents they prepare, liability can be imposed where there is reckless disregard for the truth); *Securities and Exchange Commission v. Coffey*, 493 F.2d 1304, 1315 (6th Cir. 1974) (the court holding that the liability of a lawyer can be premised upon misrepresentations made in offering circulars even though those offering circulars are ultimately prepared by others.)

under Section 10(b).[13]

II.

AT A MINIMUM, THE LANGUAGE IN THE TAIL ENDORSEMENT IS AMBIGUOUS AND THE NINTH CIRCUIT'S CAVALIER GRANT OF SUMMARY JUDGMENT TO CIGNA WAS IN ERROR

The ambiguity in the meaning of the "tail" endorsement is apparent from the contrary views taken by the two district court judges, each concluding that the language was subject to different interpretations. *See, Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1437 (9th Cir. 1993) (applying Arizona law, where different courts have interpreted same language differently, the language is deemed ambiguous.) Under Arizona law, in the event of ambiguity, the purpose of the insurance clause in question, public policy considerations, and the transaction as a whole are to be examined. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989); *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 694 P.2d 181 (1984). If, after an analysis of these factors, the language remains ambiguous, the ambiguous language is then to be construed against the insurer and in favor of coverage. *Wilson*, 782 P.2d at 734; *Security Ins. Co. of Hartford v. Andersen*, 158 Ariz. 426, 763 P.2d 246, 248 (1988). The Ninth Circuit did not even attempt such an analysis.

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[13] *See also, Breard v. Sachnoff & Weaver*, 941 F.2d 142 (2d Cir. 1991) (court held that lawyers who knowingly or recklessly prepare materially misleading solicitation documents in connection with a securities offering may be primarily liable under Rule 10b-5); *Molecular Technology Corp. v. Valentine*, 925 F.2d 910 (6th Cir. 1991) (outside counsel who reviewed a private placement memorandum could be primarily liable under Rule 10b-5 as court held that outside counsel knew or should have known that the offering memorandum he edited failed to disclose certain material facts regarding the issue).

In construing a term in an insurance policy that is on its face ambiguous, the Court must interpret it according to its ordinary meaning and effect. *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 430, 641 P.2d 1272, 1274 (1982); *Rodemich v. State Farm Mut. Ins. Co.*, 130 Ariz. 538, 539, 637 P.2d 748, 749 (Ariz. App. 1981). *See also Brady v. Black Mountain Inv. Co.*, 105 Ariz. 87, 459 P.2d 712 (1969). Moreover, the policy language at issue is to be examined from the standpoint of a person not trained in the insurance business. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982).

To determine the "ordinary meaning" of words in an insurance policy, Arizona courts apply a common sense reading: That is to say, simply, that a universal standard of plain English prevails. *Barber v. Old Republic Life Ins. Co.*, 132 Ariz. 602, 647 P.2d 1200, 1201 (Ariz. App. 1982). The "ordinary meaning" of words is routinely derived from definitions provided in the dictionary. *Millar v. State Farm Fire and Cas. Co.*, 167 Ariz. 93, 804 P.2d 822, 825-26 (Ariz. App. 1990); *Arizona Property & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451, 456 (1987). Webster's Third New International Dictionary (1986) defines "act" as:

> 1a. a thing done or being done; 2: an activity in process of completion; . . .
>
> 4: process of doing: ACTION

Webster's defines "error" as:

> 1a: an act or condition of often ignorant or imprudent deviation from a code of behavior; 2: the quality or state of erring; 3: something produced by mistake.

Finally, Webster's defines "omission" as:

> 1a: apathy toward or neglect of duty: lack of action b: something neglected or left undone 2: the act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform.

The Ninth Circuit failed to apply the ordinary meaning of these terms in the tail to the claims at issue.

A. CIGNA's Internal Documents Supported A Finding Of Coverage, Yet The Ninth Circuit Disregarded This Evidence

The Ninth Circuit also ignored an array of other evidence considered by the District Court which supported the District Court's coverage finding.

1. The Claims Register Notice

Most notable, was a CIGNA internal Claims Register Notice created on March 26, 1987 shortly after the *Sun Mesa* suit was filed against Blattner. CIGNA's internal Claims Manual mandates that all Claims Register Notices:

> Must . . . indicate the date of the act, error, or omission which engendered the claim. This date must be determined by the claim professional . . .

The CIGNA claims professional recorded the date of "2-1-84" in CIGNA's Claims Register Notice for the *Sun Mesa* claim.[14] Thus, CIGNA's own internal assessment supported the conclusion that the "act, error or omission" which "engendered" the *Sun Mesa* and *Chandler* claims occurred while Blattner was at Guren Merritt.

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[14] The Claims Register Notice actually reflects "D/Occ. 2-1-84." The claims representative who made this notation, Toni Oberscheven, testified at her deposition that the reference to "D/Occ." meant date of occurrence, which was synonymous with the date of "act, error or omission." Significantly, this date corresponds with numerous allegations in the underlying complaints regarding the organization of the "scheme to defraud" bondholders, and the date of application to the Sun Mesa and Chandler Industrial Development Authorities. (See ¶¶ 7, 24, 33, 49, 62, 174)

2. CIGNA's Coverage Counsel Conceded That Blattner Performed Coverage Triggering Acts, Errors Or Omissions While At Guren Merritt

Richard Segal, CIGNA's insurance coverage counsel, conceded in a December 11, 1990 letter that:

> it appears to be true that Mr. Blattner rendered services on the projects during January, February and March 1984 and that during that period [when he worked at Guren, Merritt] he undertook a review of relevant Arizona [life care] statutes.

3. CIGNA's Post-Settlement Grant Of Defense

CIGNA's most prominent admission of coverage is set forth in its post-settlement letter of March 25, 1991, in which it granted a "defense" to Blattner under the tail endorsement after the underlying cases settled. This is most significant because it cannot be reconciled with the Ninth Circuit's holding, yet the Ninth Circuit failed to even consider this fact.

In granting this defense, CIGNA itself recognized that sufficient allegations existed in both the *Sun Mesa* and *Chandler* complaints to support a finding of coverage under the tail. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 509 P.2d 222, 224 (1973); *U.S. Fidelity & Guar. Corp. v. Advance Roofing & Supply Co., Inc.*, 163 Ariz. 476, 481, 788 P.2d 1227 (Ariz. App. 1990) (an insurer cannot rely upon the pleadings alone to deny coverage where those allegations in conflict "with facts known or reasonably ascertainable by the insurer."); *Aetna Cas. & Sur. Co. v. Dannenfeldt*, 778 F. Supp. 484, 499 (D. Ariz. 1991) (when the allegations of a complaint are ambiguous or inadequate, an insurer must investigate facts which might give rise to potential liability).

Moreover, by conceding it owed a duty to defend Blattner

under the tail at a time when the cases were settled and no further facts remained to be discovered, CIGNA was duty-bound under Arizona law to provide coverage for the March 1991 settlement. *Home Indem. Co. v. Mead Reinsurance Corp.*, 166 Ariz. 59, 800 P.2d 46, 48 (Ariz. App. 1990) (duty to indemnify "necessarily had to follow the duty to defend [where] settlement made it impossible to determine on what theories of liability, if any, the underlying claimants would have prevailed").

B. The Ninth Circuit Ignored CIGNA's Contrary Representations To The Ohio Department Of Insurance

The Ninth Circuit similarly failed to consider CIGNA's statements of the intent of its insurance policy to state insurance regulators. The predecessor version of CIGNA's lawyers professional liability policy in existence prior to the issuance of the Guren Merritt policy utilized the insuring clause "negligent act, error or omission." In 1979, CIGNA filed with the Ohio Department of Insurance its proposed revised Lawyers Professional Liability Policy and Policy Revisions Explanation. This revised form was approved for use by the Ohio Department of Insurance based upon CIGNA's representations and was sold to Guren Merritt.[15]

Among many revisions to its policy, CIGNA changed its insuring clause from "negligent act, error or omission" to require simply an "act, error or omission." CIGNA expressly represented to the Ohio regulators that the removal of the word "negligent" from this clause was to avoid possible restrictive interpretation. (emphasis added.) At the very

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[15] Blattner was an Ohio resident and both the Guren Merritt and Benesch firms maintained their offices in Ohio. CIGNA was required to obtain approval from the Ohio Department of Insurance to issue the form insuring language for sale in that state. *See, Ohio Ins. Code* §3937.14.

same time, CIGNA also obtained approval to increase from 25% to 225% the premium charge for its tail coverage because of what it characterized as the "unlimited exposure" potential under the tail.

C. The Ninth Circuit Ignored Inconsistent Testimony Of The CIGNA Policy Drafters

Finally, CIGNA's own representatives who authored the subject policy language supported the District Court's finding of coverage. In the District Court, CIGNA produced Stephen Gerstman in response to Plaintiffs' Rule 30(b)(6) deposition notice as the person most knowledgeable regarding the drafting of the tail endorsement. Gerstman testified that he did not ever formulate an understanding of the language used in the tail endorsement. (Tab 75)

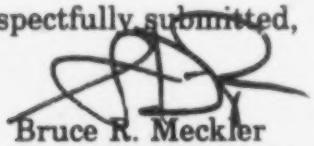
In short, there exists no support in either the law or the factual record for the Ninth Circuit's decision. To the contrary, the District Court's detailed decision granting summary judgment to petitioners was correct and should have been affirmed.

CONCLUSION

For all of the foregoing reasons, the Ninth Circuit's five page unreported memorandum decision was nothing short of a complete miscarriage of justice in this case, impacting not only the thousands of *Sun Mesa* and *Chandler* bondholders damaged by Blattner's professional negligence, but also clients of other professionals insured under tail endorsements to claims-made professional liability policies who are the intended beneficiaries of such insurance.

Petitioners therefore respectfully request this Court to grant their petition for writ of certiorari.

Respectfully submitted,



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Dated: August 19, 1997

CERTIFICATE OF SERVICE

In accordance with Supreme Court Rule 29, this is to certify that the required copies of this Petition For Writ Of Certiorari have been forwarded to all counsel named below by placing same in the United States Mail, properly addressed and first-class postage prepaid on this 19th day of August, 1997.

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APPENDIX

App. 1

[Filed April 22, 1997]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOYCE I. OLDFATHER, individually and as Representative of a Bondholder class; EDWIN BERTRAND, individually and as Representative of a Bondholder class,	)	No. 96-15047
	)	D.C. No. CV-91-00734-ROS
	)	MEMORANDUM*
Plaintiffs-Appellees,	)	
vs.	)	
CIGNA INSURANCE COMPANY, fka INA Underwriters Insurance Company,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and submitted March 13, 1997
San Francisco, California

Before: GOODWIN, BRUNETTI, and FERNANDEZ, Circuit Judges.

CIGNA Insurance Company appeals the district court's order granting partial summary judgment for two classes

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

of bondholders who had invested in industrial revenue bonds for two health care facilities. The court found that coverage existed for stipulated $23 million judgments in the underlying class actions under a professional liability policy issued by CIGNA to the law firm of Guren, Merritt, Feibel, Sogg & Cohen ("Guren"). We reverse the district court's decision and grant summary judgment in favor of the appellant.[1]

The district court erroneously held that Robert Blattner's conduct at the Guren firm constituted an "act, error or omission" sufficient to trigger coverage under Guren's insurance policy issued by CIGNA.

The bondholders initially filed suit against Blattner, his then-current law firm, Benesch, Friedlander, Coplan & Arnoff ("Benesch"), and others for losses arising out of the default on bonds issued to finance two health care facilities. One cause of the default, according to the bondholders, was the failure to obtain life care permits for the projects.

The bondholders relied upon "Official Statements" issued by Benesch in electing to invest in the facilities. After both bond projects failed, the bondholders claimed that the official statements prepared by Blattner neglected to disclose the need for and the absence of life care permits. The bondholders now look to CIGNA for coverage for the bond failure under the company's professional liability policy issued to Guren, the law firm where Blattner began work on the bond projects.

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[1] This case was reassigned to Judge Silver after the bondholders prevailed on their summary judgment motion. Prior to trial on the remaining issues, Judge Silver certified the case for appeal to this court pursuant to 28 U.S.C. § 1292(b).

As the district court noted, "[t]he parties agree that the dispositive coverage issue is whether [Blattner] committed an 'act, error or omission' which triggered coverage under the Guren, Merrit policy." The bondholders stated on appeal, "[t]he basic thrust of the suits . . . was [Blattner's] alleged breaches of duties of care owed as lead bond counsel, including his failure to obtain life care permits as required by Arizona law." In essence, the bondholders contend that Blattner's continuous acts, starting with preliminary discussions at Guren and ending with the issuance of the disclosure statements at Benesch, were sufficient to incur coverage under Guren's policy with CIGNA.

The insurance policy issued to Guren states that CIGNA is required:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured or any person for whose acts the Insured is legally liable:
>
> a) by reason of any act, error or omission in professional services rendered or which should have been rendered by the Insured or the Insured's employees . . . .

The bondholders' summary judgment motion claimed that Guren's policy provided coverage for Blattner's actions on the ill-fated bonds while at the firm and the district court agreed.

However, the appellees do not contend that Blattner issued the Official Statements which failed to include the life care requirements until after he left Guren. The complaint failed to identify any conduct by Blattner that created liability under Guren's policy; nor have the bond-

holders added additional allegations on summary judgment to bolster their contention. This deficiency is fatal to the bondholders' case. They attempt to assign liability for Blattner's performance of legal services at one law firm which eventually resulted in allegedly faulty documents issued by a second law firm. Without evidence that Blattner committed some liability-creating "act, error or omission" while at the Guren firm, the bondholders simply have no claim. We cannot equate the liability-creating act of issuing a disclosure statement with the preliminary acts of discussing the requirements for such a document.

This case is predicated upon Blattner's failure to disclose that the project required life care permits. Blattner's "act, error or omission" could not occur until he failed to make the necessary disclosure in the Official Statements, an event which occurred after he left the Guren firm. Additionally, Blattner prepared, signed, and delivered opinion letters on Benesch firm letterhead attesting to the validity of the bonds and their status, and the bondholders received copies of these opinion letters. Regardless of Blattner's culpability, the Guren firm cannot be held liable for actions undertaken after Blattner left their employ; necessarily, the bondholders' claim must fail.

Alternatively, the bondholders argue that Endorsement 7 of the policy expanded coverage to include Blattner's actions after he left Guren because of the "arising out of" language. This contention also fails. Endorsement 7's plain language clearly does not expand the scope of the coverage beyond the original policy:

> Coverage will be provided according to the applicable terms, conditions and exclusions of this policy for all

> claims first made after the termination of the Policy period, arising out of any act, error or omission . . . *which took place prior to the end of the Policy period and were caused by the Insured or any other person for whose act, errors or omissions the Insured is legally responsible, and are otherwise covered by the Policy*.

Use of Endorsement 7 does not advance the bondholders' argument beyond their primary contention that Blattner acted illegally while at Guren. Appellees present no case law to the contrary and any other interpretation of the language is untenable.

Thus, the district court erred not only by granting summary judgment for the bondholders, but in failing to grant summary judgment for CIGNA.

SUMMARY JUDGMENT FOR APPELLEES REVERSED; SUMMARY JUDGMENT FOR APPELLANT GRANTED.

App. 6

[Dated June 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOYCE I. OLDFATHER, Individually and as Representative of a Bondholder Class, et al., Plaintiffs,	)	
v.	)	No. CIV 91-0734 PHX CAM
CIGNA INSURANCE COMPANY (f/k/a INA UNDERWRITERS INSURANCE COMPANY), a California insurance corporation, Defendant.	)	**ORDER**

Having considered the parties' cross motions for summary judgment, the Court concludes as follows:

Background

Plaintiffs filed this action as representatives of their certified classes raising claims of bad faith and breach of contract against Defendant CIGNA which were assigned by Robert Blattner, a defendant in the underlying actions, to the plaintiff classes in the settlement of the two underlying class action suits [*Oldfather v. Sun Mesa Corp.*, CIV 86-1968 PHX CAM and *Bertrand v. Industrial Development Authority of the City of Chandler*, CIV 89-1087-PHX RCB]. The settlement agreement[1] from the

[1] These cases were consolidated for settlement purposes and the settlement was approved by this Court.

underlying actions assigned the claims against CIGNA based upon INA's (now CIGNA) denial of coverage under a $5 million professional liability policy that plaintiffs allege was applicable to Blattner's liability in the underlying class actions.

Relevant to the underlying class actions, defendant Blattner was counsel for the *Sun Mesa* and *Chandler Manor* industrial revenue bond projects. During the course of Blattner's representation relevant to those projects, he worked at two different law firms. He worked at the firm of Guren, Merritt, Feibel, Sogg & Cohen (Guren, Merritt) in 1984 for the first two and one half months that he worked on the projects. Then, in March of 1984, he left Guren, Merritt and began working for the firm of Benesch, Friedlander, Copeland & Arnoff (Benesch).

Numerous professional liability insurance policies were relevant to the *Sun Mesa* and *Chandler Manor* actions. The insurance policy at issue in this case, the 1983-1984 Guren, Merritt policy issued by CIGNA, provided the primary professional liability insurance for $5 million to Blattner during his term at the Guren, Merritt firm.

Plaintiffs seek partial summary judgment on the issue of coverage under the insurance policy defendant CIGNA provided to Blattner. The parties agree that the dispositive coverage issue is whether Robert A. Blattner, a partner in the Guren, Merritt firm, committed an "act, error or omission" which triggered coverage under the Guren, Merritt policy. Plaintiffs argue that because the policy fails to define what constitutes and "act, error or omission" the ordinary meaning of the languages applies to afford coverage to Blattner for his alleged acts committed while at Guren, Merritt in connection with the underly-

ing *Sun Mesa* and *Chandler Manor*, bond projects. In the alternative, plaintiffs argue that if the language is ambiguous, coverage should be found construing the language against CIGNA and consistent with the reasonable expectations of the insured.

Defendants filed a response and cross motion for summary judgment arguing that there was no coverage under the policy because plaintiffs never alleged that Blattner's conduct while at Guren, Merritt was wrongful, tortious or the cause of their damage.

The defendant agrees with plaintiffs that the question of coverage under the policy presents a question of law of whether "Robert Blattner commit[ted] an act, error or omission while at Guren, Merritt which triggered coverage under the professional liability policy at issue."

Summary Judgment

Summary judgment may be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

The disputed fact(s) must be material. *Id.* Substantive law determines which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The dispute must also be genuine. A dispute about a material fact is genuine if "the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11. In a civil case, the question is:

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512.

Moreover, if the factual context renders the non-movant's claim implausible, that party must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 457, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party who has the burden of proof on the issue at trial must establish all of the essential elements of the claim or defense for the court to find that the moving party is entitled to judgment as a matter of law. *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986); *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). However, the moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, summary judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an

essential element of his case on which he will bear the burden of proof at trial. *Id.*

Undisputed Facts

The following facts relevant to these motions are undisputed:[2]

A. Background of the *Sun Mesa* and *Chandler Manor* actions

1. The bond projects

The concept of the Sun Mesa and Chandler projects and the initial work to proceed with the projects and the bond issuances began in late 1983. SOF 34. Robert Blattner was co-bond counsel for both the *Sun Mesa* and *Chandler Manor* industrial revenue bond projects. SOF 80. He began working on the projects while he was a partner at the Benesch firm. SOF 81. Blattner was one of the first persons retained by the projects' developers and was involved in the earlier discussion of the projects and the bond issuances in late 1983. SOF 34. Billing statements indicate that Blattner conducted telephone

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[2] Defendant CIGNA argued that almost every one of the almost 150 statements of fact relevant to these motions were disputed, mainly by arguing that the evidence provided by plaintiffs did not support the statements of fact. Thus, the Court was required to thoroughly read all of the evidence submitted. After reading that evidence, in almost every case, the Court concluded that the evidence did support the statement of fact set forth by the plaintiffs. The Court does not appreciate the defendant wasting its time in such a manner. If this same action occurs in subsequent pleadings, the Court will sanction the responsible party.

conferences regarding the projects as early as November of 1983 and continuing through late March of 1984. SOF 35.

Blattner was one of the members of the Sun Mesa/ Chandler "working group" at the end of 1983. SOF 36-37. "[T]he lead of the project was taken by Furby, Blattner and Rick Clark. . ." SOF 37. The "working group" assisted Furby in preparing the official statements for both projects. SOF 38. The official statements were prepared by having each working group member provide information to Furby, who then assembled a draft of the preliminary official statements which was then reviewed by the entire working group, paragraph-by-paragraph, to see that the official statement was complete and accurate. SOF 38. This review was accomplished primarily at the working group's due diligence meetings. SOF 38.

Generally, Blattner and Furby would choose the dates for the due diligence meetings and Liberatore would contact other members to coordinate the times of the meetings. SO 39. Both counsel Furby and Blattner occupied leadership roles at the due diligence meetings. SOF 39.

A memorandum of February 14, 1984 indicated that Blattner and Furby:

> should have a POS [preliminary official statement] complete and ready for the Due Diligence meeting scheduled for March 20th for both projects. They should also coordinate the bond documents and POS and confirm the date for due diligence. All documents are to be reviewed by Gary Dubin and Rick Clark in advance of said meeting."

SOF 40.

On February 23, 1984, there was a "drafting session" in Columbus, Ohio for the preliminary official statement for both projects, which Mr. Blattner attended.[3]

In a March 15, 1984 letter, May Zima, the CPA firm involved in the project, sent to the members of the working group, including Mr. Blattner, a preliminary draft of the feasibility study for their review and comment. SOF. 43.[4]

There appears to be an issue of fact as to whether Blattner had knowledge of the life care permit requirement while he was at Guren, Merritt and while he was participating in the due diligence meetings in early 1984. Plaintiff's exhibits include a letter from May Zima dated March 6, 1984 stating that the Arizona Insurance Code applied to the projects. However, there is no indication that the letter was provided to Blattner while he was at the Guren, Merritt firm. Rather, defendant's exhibits establish that as of the March 28, 1984 meeting, the members of the group, including Mr. Blattner, were uncertain as to whether the life care permit was required for the projects. SOF 45. A March 14, 1984 letter from the Foley firm indicated that, pursuant to a phone conversation of March 8, 1984, Mr. Drummond was enclosing a copy of the proposed modifications to the Arizona life care contract statutes. SOF 46. Mr. Drummond tes-

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[3] Although the defendant argues that the plaintiffs' evidence does not support this fact, Mr. Blattner's time sheets indicate that he attended that meeting. *See* tab 30.

[4] Robert Blattner joined the Benesch firm and became a partner on March 24, 1984. SOF 43. neither party has presented evidence as to whether Blattner reviewed this document while employed by the Benesch firm or Guren, Merritt firm. *See* SOF 43.

tified that he provided copies of the life care statutes to a member of the Benesch firm in the spring of 1984. SOF 47. At the time of closing and prior to the time of closing, local counsel, Rick Clark, advised Blattner of the required Arizona permits or licenses necessary to operate the project. SOF 48.

Further, evidence establishes that as of March 6-8, 1984, local counsel and the feasibility consultant expressed their opinion in writing that the life care permits applied to the projects. SOF 49. In March of 1984, Drummond worked on a sample residence agreement, the contract that the projects' elderly residents would sign upon admission for both project. SOF 50. On March 16, 1984, the sample residence agreement, which was still subject to review and approval by the board of directors was submitted to the IRS as part of the information for the projects' applications for tax-exempt, non-profit status. SOF 52. On March 8, 1984, Blattner discussed the IRS application with Arizona local counsel. SOF 53. Blattner acknowledge that his firm would have reviewed the IRS applications for accuracy. SOF 54. Clark testified that he would have discussed the residence agreement with all the working group members during spring, probably March, of 1984. SOF 56. Blattner and others at Guren, Merritt prepared the applications to the municipal bond issuing authorities, the Mesa and Chandler IDAs, and prepared most of the necessary supporting documentation. SOF 57. The applications did not disclose that the projects required life care permits.[5]

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[5] Defendant objects to this statement of fact, arguing that disclosure was not required. The Court will consider the fact as a fact and not a legal conclusion which presumes that disclosure is required.

The undisputed evidence establishes that the defendant believed that Blattner worked on the life care issue and had knowledge of the requirement while at the Guren Merritt firm. In September of 1989, Marson requested Home Office CIGNA authority to raise the initial $100,000 reserve for the *Sun Mesa* and *Chandler Manor* claims to the $5 million limit of the PEIC Benesch policy. SOF 118. In October of 1989, Linda Ramsey of CIGNA's Home Office was reviewing Marson's reserve increase request and, on October 31, 1989, telephoned Marson to review with her the information including the "date of loss." SOF 119. Marson concluded that in February or March of 1984, while at Guren Merritt, that life care permits could be necessary for the *Sun Mesa* and *Chandler Manor* projects. SOF 120. An increase in the reserve from $100,000 to the $5 million limit was requested based in part on the allegation that life care permits were required but application was not made and the prospectus did not refer to the life care permits. SOF 121. Based on that request, the reserve was subsequently increased to $5 million. SOF 121. In addition, Richard Segal, counsel for CIGNA, stated in a December 11, 1990 letter that "it appears to be true that Mr. Blattner rendered services on the projects during January, February and March 1984 and that during that period [when he worked at Guren, Merritt] he undertook a review of relevant Arizona statutes." SOF 121.

Robert Blattner left the Benesch firm and became a partner at the Guren Merritt firm on March 24, 1984.

SOF 59, 82-83.[6] Robert Blattner continued to work on the bond projects while he was a partner at the Benesch firm. SOF 84. Deanna Kursh is a former associate of the Guren Merritt firm. SOF 85. She assisted Mr. Blattner and performed work on the bond projects while she was an associate at the Guren Merritt firm. SOF 86. She also left the Guren, Merritt firm and became an associate with the Benesch firm on March 24, 1984. SOF 59, 87-88. Ms. Kursh continued to assist Mr. Blattner on the bond projects after she joined the Benesch firm. SOF 89.

The *Chandler Manor* industrial revenue bonds were not available for sale to the public until after that project's closing date of August of 1984. SOF 102. The *Sun Mesa* industrial revenue bonds were not available for sale to the public until after that project's closing date of November of 1984. SOF 103. No *Chandler Manor* or *Sun Mesa* bonds were sold to the public while Blattner was at the Guren, Merritt firm. SOF 104.

The Sun Mesa bond offering closed in November of 1984 and the Chandler Manor industrial revenue bond offering closed in August of 1984. SOF 33, 90, and 91. Both the *Sun Mesa* and *Chandler Manor* bond projects closed after Blattner and Deanna Kursh left the Guren, Merritt firm. SOF 92. Default in the payment of interest on the *Sun Mesa* industrial revenue bond was declared in 1986. SOF 93. Default on the Chandler Manor bonds was declared in 1987. SOF 94. The plaintiff class in the underlying class actions knew that Blattner had been

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[6] Although the defendant states in its facts that the date Mr. Blattner left Guren, Merritt was March 19, 1984, the evidence does not support that statement of fact. Rather, plaintiffs' fact regarding the March 24 date has supporting evidence.

retained as co-bond counsel and had performed professional services in that regard while he was at the Guren, Merritt firm. SOF 96.

The combined total fees billed by Blattner in connection with both projects while at Guren, Merritt and at Benesch was $100,000. Of this amount, roughly $20,000 was paid to Guren, Merritt. SOF 60.

2. The class action lawsuits

In November of 1986, the United Bank of Arizona, as trustee for bondholders of industrial revenue bonds issued by the Industrial Development authority of the City of Mesa, Arizona, instituted suit in this Court against Blattner, his then-current law firm, Benesch, Friedlander, Coplan & Arnoff [Benesch], all of the individual Benesch partners and others arising out of the default on the bonds issued to finance the Sun Mesa Health Care Facility. [*Sun Mesa* case]. SOF 5. Thereafter, a similar lawsuit was filed against essentially the same group of defendants arising out of the default on bonds issued by the Industrial Development Authority of the City of Chandler, Arizona to finance the Chandler Manor Health Care Facility. [*Chandler Manor* case]. The class members in these actions were investors of the Sun Mesa and Chandler Manor industrial revenue bonds. SOF 101. The Benesch, Friedlander, Coplan & Arnoff firm was a named defendant in both the underlying cases of *Sun Mesa* [*Oldfather v. Sun Mesa Corporation*, CIV 86-1968 PHX CAM] or *Chandler Manor* [*Bertrand v. Industrial Development Authority of City of Chandler, et al.*, CIV 89-1087]. SOF 99. Individual partners of the Benesch firm were also named in the underlying cases. SOF 100.

The Guren, Merritt firm was not a named defendant in the underlying litigation of the *Sun Mesa* [*Oldfather v. Sun Mesa Corporation*, CIV 86-1968 PHX CAM] or *Chandler Manor* [*Bertrand v. Industrial Development Authority of City of Chandler, et al.*, CIV 89-1087] cases. SOF 97-98.

The class members alleged in part that they relied on the Sun Mesa and Chandler Manor projects' respective official statements when investing in bonds which were issued as a result of those projects. SOF 105. The official statement was a prospectus-like document on the viability of the Sun Mesa and Chandler Manor residential life care facilities. SOF 106. The plaintiffs contended that the official statement should have disclosed the need for and absence of life care permits. SOF 107. The plaintiffs alleged in part that Blattner and the Benesch firm failed to advise the investing public of the need for life care permits. SOF 110. The fact issues of whether or not the residency agreements required life care permits formed the basis for the settlement of the underlying claims against Blattner. SOF 108.

B. The relevant insurance policy provisions and coverage

1. The INA policy at issue in this case—the Guren, Merritt Policy

INA Underwriters Insurance Company, now CIGNA Insurance Company, issued a $15 million [$5 million per claim with a $15 million aggregate] claims-made Lawyers Professional Liability Policy [the Guren Merritt policy] No. LEO 02 46 22 to the Cleveland, Ohio law firm of Guren, Merritt, Feibel, Sogg & Cohen [Guren, Merritt]

for the policy period of November 1, 1983 to November 1, 1984 in return for the payment of a $25,764 premium. SOF 1, 73 and 78. As a partner in the Guren, Merritt firm, and while he remained a partner, Robert A. Blattner was an insured under this policy. SOF 1. The policy provides in part that CIGNA is required:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured or any person for whose acts the Insured is legally liable:
>
> > (a) By reason of any act, error, or omission in professional services rendered or which should have been rendered by the Insured or the Insured's employees in the conduct of the Insured's profession as a Lawyer or Notary Public;

SOF 79.

Under the contract, CIGNA also promised to defend claims:

> With respect to such insurance as is afforded by this Policy, the Company shall:
>
> > (a) have the right to appoint counsel and the duty to defend any suit against the Insured alleging damages even if such suit is groundless, false or fraudulent.

In addition, the policy was a "claims made" policy that provided:

> This Policy applies to acts, errors or omissions which occur anywhere in the world:
>
> > (a) during the Policy period and then only if claim is first made during the policy period.

Claims-made liability policies do not by their express intent afford coverage after expiration, termination or cancellation of the policy. SOF 2.

The policy also provides that in the event of a termination or cancellation of the CIGNA policy, that Blattner had an option to purchase what is generally known in the insurance industry as unlimited "tail" coverage. The policy provided in this respect:

VI. EXTENDED DISCOVERY PERIOD:

> In the event of cancellation or nonrenewal by either the Named Insured or the Company, the Named Insured shall have the right upon payment of an additional premium within thirty (30) days of the termination, to have issued an endorsement providing an unlimited extended discovery period covering claims first reported during the extended discovery period arising out of acts, errors or omissions which took place prior to the end of the Policy period, and which are otherwise covered by the Policy. The premium shall be equal to 225% of the Named Insured's last annual premium. The premium may be paid in installments as determined by the Company.

On or about June 1, 1984, the Guren, Merritt firm dissolved and pursuant to Article VI of the policy, Guren Merritt paid to CIGNA the 225% additional premium ($42,512) and purchased a "tail endorsement" to the policy with limits of liability of $5 million.[7] SOF 3. The tail endorsement provides extended coverage for claims

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[7] Tail coverage affords a continuity of coverage by extending the policy to cover claims reported after the initial policy has ended.

reported after the policy expired, provided the claims were based on an act error or omission committed before the policy expired. SOF 2, 76.

The tail endorsement provides:

> In consideration of the additional premium charge it is agreed that:
>
> 1. Coverage will be provided according to the applicable terms, conditions and exclusions of this Policy for all claims first made after the termination of the Policy period, **arising out of any act, error, or omission** in rendering professional services for others in the Insured's capacity as a lawyer, which took place prior to the end of the policy period and were caused by the Insured or any other person for whose acts, errors, or omissions the Insured is legally responsible, and are otherwise covered by the Policy.

SOF 77 (emphasis added).

Neither the language of the tail endorsement, nor any term of the Guren, Merritt policy was negotiated between the parties. Rather, the policy was a form drafted exclusively by CIGNA. SOF 4. There is no definition in the policy for "act, error or omission." However, there are definitions in the policy for terms such as "insured," "damages," "personal injury," "policy period," and "claims expenses." SOF 4.

2. The PEIC policy

Pacific Employers Insurance company [PEIC], who had issued a claims-made Lawyers Professional Liability Policy, No. LMI 23 51 96, to the Benesch firm for the period of January 19, 1987 to January 19, 1988, accepted coverage for both the *Sun Mesa* and *Chandler Manor*

suits under that policy. SOF 7-8. By letter dated April 1, 1987, CIGNA's claim director, Ms. Toni Oberscheven, acknowledged coverage to Benesch for the *Sun Mesa* case without any reservation concerning coverage under the PEIC policy. SOF 9. By letter dated April 1, 1987, signed by Toni Oberscheven, PEIC [also CIGNA] retained the law firm of Jennings, Strouss & Salmon to defend the interests of Blattner and other Benesch partners in the *Sun Mesa* case. SOF 10. Shortly after the *Chandler Manor* action was filed, the Jennings firms accepted service of the *Sun Mesa* complaint on behalf of Blattner and Benesch. SOF 11. CIGNA also accepted coverage for the *Chandler Manor* case under the PEIC policy without any reservation concerning coverage. SOF 11.

3. Plaintiffs' attempts to obtain a copy of the Guren Merritt policy

In answers to interrogatories served upon plaintiffs in the *Sun Mesa* and *Chandler* cases in December of 1989, Jennings, Strouss & Salmon (JS&S) identified the Guren, Merritt policy by the wrong insurance company and wrong policy number. SOF 122. In response to plaintiff's request for production of the Guren, Merritt policy, JS&S advised plaintiffs on July 27, 1990 that the policy was in possession of the insurance company. SOF 123. A letter from plaintiffs dated July 17, 1990 requested clarification of the insurance policy coverage. SOF 124.

On August 23, 1990, plaintiffs served a subpoena upon PEIC requesting a copy of the Guren, Merritt policy identified by JS&S in its December 1989 responses to discovery. SOF 125. On October 10, 1990, Ms. Marson

sent a memorandum to Mr. Betts of CIGNA's Home Office Legal Department advising him to forward to her attention any materials received regarding the Guren, Merritt policy. SOF 126. On October 24, 1990, plaintiff's counsel wrote to Mr. Betts of CIGNA demanding compliance with the subpoena and seeking production of the Guren, Merritt policy. SOF 127. On November 1, 1990, Mr. Betts forwarded to Ms. Marson Plaintiffs' subpoena with the suggestion that "perhaps we will be able to redirect [plaintiffs' counsel's] efforts." SOF 128. Plaintiffs' counsel and Ms. Marson exchanged letters dated November 2, 1990, November 7, 1990 and November 14, 1990 concerning the subpoena for the Guren, Merritt policy. Despite plaintiffs' compliance with Marson's requests for information regarding the subpoena, Marson still refused to produce the Guren, Merritt policy. SOF 129.

On January 9, 1991, plaintiffs filed a Petition for Order to Show Cause why PEIC should not be found in contempt for failure to produce the Guren, Merritt policy. SOF 130. JS&S forwarded the Petition to Marson on January 10, 1990. SOF 131. On January 10, 1990, Marson called JS&S in response to her receipt of the petition and advised JS&S that Dick Segal of Gust, Rosenfeld had been retained to represent PEIC concerning the subpoena. SOF 132.

On January 11, 1990, Mr. Segal provided plaintiffs with a copy of the Guren, Merritt policy, indicating that the policy number in the subpoena was not that of the Guren Merritt policy [however, it was the policy number from the interrogatory answer]. SOF 133.

4. Blattner's request for coverage under the Guren, Merritt Tail Policy

a. Application and the CRN

On March 26, 1987, shortly after the suit was filed against Blattner and Benesch in *Sun Mesa*, a PEIC, also CIGNA, clerk filled out a claims register notice (CRN) for *Sun Mesa* indicating "2-1-84" as the date of the "act, error, or omission" which engendered the *Sun Mesa* claim against Blattner and Benesch. SOF 62. On March 25, 1987, Toni Oberscheven prepared all of the necessary documents to establish CIGNA's claim file for the *Sun Mesa* claim, including a one-page sheet in her long-hand containing the information ultimately entered by Felisa M. Tabor into the typewritten CRN. Oberscheven, according to her usual practice, conducted a coverage analysis for purposes of preparing these documents. SOF 117.

Ms. Marson testified that a CRN, claims register notice, is a form that a claims person has to complete in order to have the claims set up as a file into the computer, "provided they have all the information." SOF 116. CIGNA's internal claims manual provides that all Claims Register Notices (CRNS):

> Must *also* indicate the date of the act, error, or omission which engendered the claim. This date must be determined by the claim professional with instructions for entry in the lower left hand corner of the "Coverage Applicable - Limits" block on the Claim Register Notice.

SOF 61.

According to the clerk who filled out the CRN, Ms. Oberscheven, "D/Occ. 2-1-84" meant the date of occurrence of

2-1-84. Ms. Oberscheven testified that the word "occurrence, as used by her, was synonymous with "act, error or omission." SOF 63.

Ms. Marson states in her affidavit that she did not fill out the form or rely on the date as the date of occurrence. SOF 62. Ms. Marson further testified at her deposition that she had never referred to the CIGNA claims manual, Section C, page 32 regarding the portion of "claims made and reported" and did not have any understanding of what that portion of the claims manual meant. SOF 115.

b. Correspondence

By letter dated May 20, 1987, William Birmingham, the senior partner in the Jennings' firm representing Benesch in *Sun Mesa*, responded to a request made by CIGNA in an April 1, 1987 letter to Jennings concerning an analysis of the insured's liability. SOF 12. In that letter, Birmingham advised CIGNA that the *Sun Mesa* and *Chandler Manor* cases presented a potential of $28.5 million in liability to Blattner and Benesch. SOF 12.

In a letter dated May 25, 1988, David Schaefer, a partner at the Guren Merritt firm who had corresponded with counsel regarding liability under the policy, wrote to the Jennings firm indicating that Mr. Blattner was a partner at Guren Merritt when the work commenced that led to the *Sun Mesa* and *Chandler Manor* cases. SOF 13-14. The letter further indicated that Mr. Schaefer felt that the policy provided additional coverage under the Guren Merritt policy for the former Guren, Merritt partners. SOF 14. In a letter dated June 8, 1988, Birmingham of the Jennings firm forwarded Schaefer's

May 25th letter to Toni Oberscheven of CIGNA. SOF 15. Ms. Oberscheven forwarded the letter to her successor, Ann Marie Marson. SOF 16. In a letter dated June 23, 1988, Marson, who had also been handling Benesch's claims under the PEIC policy for the *Sun Mesa* and *Chandler Manor* cases, responded to Schaefer's May 25, 1988 letter concerning the Guren, Merritt policy. SOF 17. By letter dated September 13, 1988, Schaefer responded to the inquiries in Marson's June 23, 1988 letter. SOF 18.

5. CIGNA's "investigation" of Blattner's claim for coverage under the Guren, Merritt Tail Policy and denial of that claim

During the next one and one-half years, Marson "investigated" Blattner's coverage under the Guren Merritt tail policy. CIGNA did not provide a defense to Blattner under the Guren Merritt policy during this period. Upon receipt by Marson of Schaefer's September 13, 1989 letter, Ms. Marson concluded that she was in need of no further information from Benesch concerning her investigation of the claim for coverage under the Guren, Merritt tail. SOF 20. Prior to this September 13, 1989 letter, Marson did not consider reviewing the files of the Jennings Firm in the underlying *Sun Mesa* and *Chandler Manor* cases. SOF 21.

By letter dated September 18, 1989, Marson denied coverage to Blattner under the Guren, Merritt policy, stating as follows:

> The document filed to date to [sic] not allege any act, error omission by Mr. Blattner while he was employed by Guren, Merritt. Moreover, discovery to

> date, does not reveal any alleg [sic] act, error or omission which occurred by Mr. Blattner during his employment with Guren, Merritt. Thus, we will not be providing coverage to Mr. Blattner or the law firm of Benesch, Friedlander under the policy issued to Guren Merritt.

SOF 22.

By letter dated October 20, 1989, Schaefer responded to Marson's September 18, 1989 letter. SOF 23. In that letter, Schaefer summarized his interpretation of CIGNA's denial as a denial because no "negligence occurred prior to the dissolution of the Guren, Merritt firm and, therefore, that there will be no need for the CIGNA policy issued to Guren, Merritt to be called upon to provide indemnification in connection with the *Oldfather* and *Pederson* [*Sun Mesa* and *Chandler*] litigations. SOF 23. By letter dated November 1, 1989, Marson wrote back to Schaefer and clarified CIGNA's position as follows:

> First, the law firm of Guren Merritt is not considered a predecessor firm to Benesch Friedlander under the policy issued to Benesch Friedlander since Benesch Friedlander *did not* list Guren Merritt as such on its application for insurance. Again, I direct your attention to Question 4 of Exhibit E to the Benesch Friedlander application which I previously forwarded to you. Thus, in order for there to be coverage under the policy issued to Guren Merritt, the terms and conditions of that policy must be satisfied.
>
> Second, coverage would be afforded under the policy issued to Guren Merritt provided, among other things, that the lawyer was acting in his professional capacity on behalf of Guren Merritt. At this time, no allegations are being made against any attorney con-

> cerning conduct while employed by Guren Merritt. Rather, all pleadings and discovery to date concern activity which occurred while the defendants were employed by Benesch Friedlander. Thus, at this time, coverage under the Guren Merritt policy has not been triggered.
>
> Further, please be advised that Pacific Employers is not requesting that Benesch Friedlander demonstrate that any of its attorneys were negligent in this matter. It would be ironic for Pacific Employers to make such a request when, as you are aware, we are defending Benesch Friedlander in these lawsuits pursuant to the firm's policy with Pacific Employers.

SOF 24. The letter further stated:

> Should new information surface alleging any activity by a former member of Guren Merritt while that member was employed by Guren Merritt, we will re-evaluate our position at that time.

SOF 24.

On January 4, 1991, this Court denied Blattner and the Benesch firm's motion for summary judgment in the *Sun Mesa* case. The motion was denied in part because "someone at the firm [Benesch] requested and received a copy of the life care statutes and knew of the alleged need for the life care permits." SOF 25; Order of 1/4/1991. Ms. Marson stated that she did not recall whether or not she read the order. In addition, Ms. Marson also stated that she did not recall reviewing the March 14, 1984 letter from Gary Drummond to Blattner providing Blattner with copies of the Arizona Life Care Statutes while Blattner was at Guren Merritt upon which the Order relied in denying summary judgment to Blattner and the Benesch firms. SOF 26. Prior to the denial of the motion for summary judgment, on Novem-

ber 6, 1990, the Jennings firm representing CIGNA concluded that "there exist [sic] real and substantial risks that trial of this case could result in verdicts and judgment against the Benesch law firm and it [sic] individual partners" of possibly $150,000,000. SOF 27.

By letter dated February 21, 1991 to the Jennings Firm, plaintiffs' counsel representing the *Sun Mesa* and *Chandler Manor* plaintiffs made a settlement offer for their claims against Blattner and his Benesch partners for the $15 million combined policy limits of the $5 million PEIC [Benesch] policy, and $5 million Guren, Merritt tail policy and the $5 Old Republic excess [Benesch] policy. SOF 28. Ms. Marson sent plaintiffs' February 21, 1991 demand letter by facsimile on February 22, 1991, to Richard Segal, counsel retained by CIGNA to advise it concerning CIGNA's obligations to Blattner under the Guren, Merritt policy. SOF 29.

6. The Settlement of the underlying *Sun Mesa* and *Chandler Manor* class action suits.

On March 20, 1991, prior to the pretrial settlement conference in the *Sun Mesa* and *Chandler Manor* cases before this court, the claims against Blattner and Benesch were settled without CIGNA's participation. Pursuant to that settlement, PEIC and Old Republic each agreed to pay to plaintiffs the respective limits of their policies. In return, Blattner agreed to the entry of a judgment in the amount of $23,714,346 representing the outstanding principal balance of the defaulted Sun Mesa and Chandler bonds, plus missed interest payments on the bonds as of the date of settlement, less deductions for settlements reached with the parties. SOF

30. Blattner then assigned his rights under the Guren, Merritt policy to the plaintiff classes in return for the plaintiff classes' agreement not to execute upon the judgment against Blattner or the Benesch firms. SOF 30. The March 20, 1992 settlement agreement was expressly conditioned upon the Court's approval of the terms of the settlement and CIGNA's continued refusal to settle after being given a final opportunity to contribute the limits of the Guren Merritt policy. SOF 30.

7. Offer of a defense after settlement

CIGNA maintained an internal policy which provided that in situations where more than one CIGNA affiliated company provided Lawyers Professional liability primary coverage to the same insured for the same loss, a defense would be afforded under both policies with defense costs apportioned between policies. SOF 19. CIGNA did not agree to defend Blattner under the Guren, Merritt tail until after the *Sun Mesa* and *Chandler Manor* cases had settled.[8] SOF 19.

By letter dated March 20, 1991, Ms. Marson of CIGNA offered to defend Blattner in the *Sun Mesa* and *Chandler Manor* cases pursuant to the Guren, Merritt policy [LEO 02 46 22] but stated that she still did not believe that coverage existed under the policy. SOF 31. This offer occurred five days after the *Sun Mesa* and *Chandler Manor* cases were settled and on the same day that the

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[8] The defendant argues that neither Blattner nor Benesch requested defense under the Guren Merritt policy. However, this argument is contrary to Marson's September 18, 1989 letter.

condition in the March 20th settlement agreement providing for CIGNA's contribution of the Guren Merritt policy limits expired. SOF 31. Mr. Robert Plant, the CIGNA executive who approved Ms. Marson's March 25, 1991 letter offering defense of Blattner, testified at his deposition that CIGNA was offering a "gratuitous" [because "there was no coverage under his policy"] defense to Blattner "on advise of counsel" "since the case was close to settlement." SOF 32.

Byron Lewis, one of the Jennings Strouss lawyers retained by CIGNA to defend Blattner and Benesch, had "no idea" why CIGNA offered to defend Blattner on March 25, 1991 after the *Sun Mesa* and *Chandler* cases had been settled. SOF 71. Lewis further testified that CIGNA's offer of defense on March 25, 1991 would have been "inconsistent" with CIGNA's prior denial of coverage. SOF 71.

C. 1979 Revision of the policy and relevant language of "act, error and omission"

In 1979, CIGNA filed with the Ohio Department of Insurance its proposed revised Lawyers Professional Liability Policy and Policy Revisions Explanation. SOF 64. This revised form was approved for use and was issued to Guren, Merritt. SOF 64. Among the revisions to its policy, CIGNA changed the insuring clause "*negligent* act, error or mission" to "act, error or omission." CIGNA represented to the Ohio Department of Insurance that the removal of the word "negligent" from this clause was to *avoid possible restrictive interpretation*. SOF 64. At the same time, CIGNA advised the Ohio Department of Insurance that it was increasing by 200% the premi-

um charge for the tail coverage from 25% to 225% "in view of the unlimited exposure" to CIGNA under the tail. SOF 64.

On January 23, 1992, plaintiffs served upon CIGNA a deposition notice requesting the deposition of the person(s) most knowledgeable concerning the drafting of the language of the tail endorsement at issue. SOF 65. CIGNA produced Stephen Gerstman in response to the deposition notice.[9] SOF 66. Mr. Gerstman testified that he did not recall formulating an understanding of the words "act, error or omission" in the tail endorsement when he prepared it. SOF 66. Gerstman was produced again for a deposition, in his individual capacity, on June 16, 1992. At that time, he testified that he "[was] not in a position to say exactly what [the word 'act'] means" as used in the tail. SOF 67.

Another CIGNA underwriter identified by Gerstman as playing a role in drafting the tail language at issue testified that he did not recall his interpretation of the language of the tail endorsement when drafted. Moreover, in drafting this language, he specifically did not take into consideration a situation where a lawyer may have committed "acts, errors or omissions" during more than one policy period. SOF 68. He did not take it into consideration because he did not foresee how coverage would apply. SOF 68.

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[9] Defense counsel states that he informed plaintiffs' counsel that no knowledgeable person was currently employed and produced Mr. Gerstman, a former employee. Although produced in response to the deposition notice, the defendant now denies that he was the most knowledgeable individual.

Another CIGNA claims representative who was responsible for handling a different claim under the same Guren, Merritt tail policy at issue testified that the word "act" "could be any action taken" during the policy period. SOF 69.

Ann Marie Marson of CIGNA testified that the word "act" in the Guren Merritt tail policy meant "the conduct." SOF 70.

Discussion

I. ARE THE PLAINTIFFS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF COVERAGE UNDER THE INSURANCE POLICY PROVIDED BY CIGNA TO BLATTNER OR IS THE DEFENDANT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT NO COVERAGE EXISTED UNDER THE POLICY?

The parties agree that the issue for coverage is whether Robert Blattner committed an "act, error or omission" which triggered coverage under the Guren Merritt policy. The parties also agree that the question of coverage under the policy presents a question of law that can be resolved on summary judgment. Plaintiffs argue that coverage exists under the ordinary meaning of the language and if ambiguous it should be construed against CIGNA and consistent with the reasonable expectations of the insured. Defendants argue that case law requires that the phrase "act, error or omission" requires a *negligent* act, error or omission.

A. Is the phrase act, error or omission as used in the policy ambiguous?

Under Arizona law, the issue of whether disputed insurance policy terms are ambiguous is a question of law to be determined by the court. *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1132 (1982), *cert. denied*, 459 U.S. 1070 (1982); *Farmers Ins. Co. v. Zumstein*, 138 Ariz. 469, 474, 675 P.2d 729, 734 (Ct. App. 1983); *Thomas v. Liberty Mutual Ins. Co.*, 116 Ariz. Adv. Rep. 37, 842 P.2d 1335 (App. 1992). The undisputed facts establish that the policy requires that the claim "arise out of any act, error, or omission in rendering professional services . . . which took place prior to the end of the policy period." The policy does not define the phrase "act, error or omission." However, this Court does not consider the phrase to be ambiguous on its face.

B. What is the meaning of the phrase "act, error or omission" in the policy at issue in this case?

In construing a term in an insurance policy that is on its face unambiguous, the Court must interpret it according to its ordinary meaning and effect to the terms used within the policy. *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 430, 641 P.2d 1272, 1274 (1982); *Rodemich v. State Farm Mut. Auto. Ins. Co.*, 130 Ariz. 538, 539, 637 P.2d 748, 749 (Ct. App. 1981). The court must also construe the policy language from the standpoint of a person not trained in the insurance business. *Sparks*, 132 Ariz. at 534, 647 P.2d at 1132. In addition, the Arizona Supreme Court has long held that

in buying insurance consumers are entitled to get what they paid for: protection against calamity. *State Farm Mut. Auto Ins. Co. v. Wilson*, 162 Ariz. 251, 782 P.2d 727, 732 (1989); *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 694 P.2d 181, 185 (1984).

To determine the "ordinary meaning" of words in an insurance policy, Arizona courts apply a common sense reading. *Barber v. Old Republic Life Ins. Co.*, 132 Ariz. 602, 647 P.2d 1200, 1201 (Ct. App. 1982). The "ordinary meaning" of words is routinely derived from definitions provided in the dictionary. *Ruiz v. Farmers Ins. Co.*, 121 Ariz. Adv. Rep. 29, 32, 847 P.2d 111, 116 (Ariz. Ct. App. 1992); *Miller v. State Farm Fire and Cas. Co.*, 167 Ariz. 93, 804 P.2d 822, 825-26 (Ct. App. 1990); *Arizona Property & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451, 456 (1987).

Webster's Third New International Dictionary (1986) defines "act" as:

> 1a: a thing done or being done; 2: an activity in process of completion; . . 4: process of doing: ACTION

Webster's defines "error" as:

> 1a: an act or condition of often ignorant or imprudent deviation from a code of behavior; 2: the quality or state of erring; 3: something produced by mistake.

Finally, Webster's defines "omission" as:

> 1a: apathy toward or neglect of duty; lack of action b: something neglected or left undone 2: the act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform.

Thus, these dictionary definitions provide plain meaning to the phrase "act, error or omission."

C. The undisputed evidence in this case supports a finding of coverage under the plain meaning of the phrase "act, error or omission."

First, the undisputed facts regarding the legal services performed by Blattner while at the Guren Merritt firm constitute an "act, error or omission" within the plain meaning of the phrase. Two dictionary definitions of "act" include "an activity in process of completion" or "process of doing." Several of the definitions of omission include: (1) "apathy toward or neglect of duty;" (2) "lack of action;" (3) "something neglected or left undone;" and (3) the act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform." When these definitions are applied to the action taken, it is clear that coverage exists.

Blattner began working on the bond projects as early as November of 1983, while he was at the Guren Merritt firm. Blattner was one of the first persons retained by the projects' developers and was involved in the early discussion of the projects and the bond issuances in late 1983 and continuing through late March of 1984. At that time, he was a key leader in the working group that developed the project and assisted in preparing the official statements for both projects. The "working group," including Blattner, assisted Furby in preparing the official statements for both projects. The official statements were prepared by having each working group member provide information to Furby, who then assembled a draft of the preliminary official statements which was then reviewed by the entire working group, paragraph-by-paragraph, to see that the official statement was complete and accurate. This review was accomplished primarily at the

working group's due diligence meetings. Generally, Blattner and Furby would choose the dates for the due diligence meetings and Liberatore would contact other members to coordinate the times of the meetings. Both counsel Furby and Blattner occupied leadership roles at the due diligence meetings. A memorandum of February 14, 1984 indicated that Blattner and Furby "should have a POS [preliminary official statement] complete and ready for the Due Diligence meeting scheduled for March 20th for both projects."

Blattner attended the February 23, 1984 "drafting session" in Columbus, Ohio for the preliminary official statement for both projects. Blattner and others at Guren Merritt prepared the applications to the municipal bond issuing authorities, the Mesa and Chandler IDAs, and prepared most of the necessary supporting documentation. The applications did not disclose that the projects required life care permits.

Thus, while Blattner was working at Guren Merritt he participated in the meetings and worked on the preliminary statements, including the statement to IRS and discussed the issue of life care permits. Although there is an issue of fact as to whether he was aware that life care permits were required during March of 1984, it is clear that much of the preliminary work, including some work regarding the life care permits was performed by Blattner while at the Guren Merritt firm, prior to March 24, 1984.

Thus, while he was at the Guren Merritt firm, his actions included a "process of completion" or "process of doing" in preparation of the preliminary statements and determining whether life care permits were required. As

such, he committed an "act" within the meaning of the policy.

In addition, Blattner's actions while at the Guren Merritt firm also qualify as an "omission" as "something neglected or left undone;" or "the act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform".

Moreover, the undisputed facts in this case regarding CIGNA's understanding of the terms of the contract as evidenced by its internal documents, the statements and testimony of its representatives and CIGNA's conduct in affording a belated defense to Blattner establish CIGNA's intent to afford coverage for Blattner's "acts, errors or omissions" while at Guren, Merritt.

First, the claims register notice (CRN), created on March 26, 1987, shortly after suit was filed against Blattner and the Benesch firm in the *Sun Mesa* case and a year prior to Blattner's request for coverage under the Guren Merritt tail, indicates that the "act, error or omission" which is the basis for the claim occurred on "2-1-94." Thus, CIGNA' own documents establish the intent to maintain coverage.

Second, after the case settled, CIGNA granted a "defense" to Blattner under the Guren Merritt policy. Under Arizona law, the duty to defend is triggered where the claims against the insured fall potentially within coverage. *Kepner v. Western Fire Ins. co.*, 109 Ariz. 329, 509 P.2d 222 (1973); *Baugh Construction Co. v. Mission Ins. Co.*, 836 F.2d 1164 (9th Cir. 1988). In this case, CIGNA qualified its offer only by the date of the sale of the bonds in the underlying cases. This date was known, verifiable and undisputed. By recognizing its duty to defend, CIGNA also acknowledged its duty to indemnify.

Finally, the testimony of the CIGNA drafters of the policy language and CIGNA employees also supports a finding of coverage. Defendant produced Mr. Gerstman in response to the plaintiffs' notice of deposition for person(s) most knowledgeable regarding the drafting and implementation of the language of the tail endorsement at issue. Mr. Gerstman first testified that he did not formulate an understanding of the words "act, error or omission." When produced for a subsequent deposition in his individual capacity, he testified, after being asked whether he had an understanding of what the word act meant, that he was "not in a position to say exactly what [the word act] means. On October 6, 1992, plaintiffs deposed Melinda Auer, who was a former CIGNA claims representative who handled another claim under the same Guren Merritt tail policy at issue in this case. Auer testified that the words "act, error or omission" each had independent meanings; that omission would be not doing something that should have been done; an error would have been doing something incorrectly or that shouldn't have been done; and an act could be any action taken. Finally, Ms. Marson testified that the act meant "the conduct." Such definitions, if applied to the actions in this case, afford coverage under the policy.

D. CIGNA's argument that damage during the policy period was required for coverage

CIGNA argues that its decision to deny coverage to Blattner was correct because the bonds were not sold and the underlying plaintiffs were not damaged until after Blattner left Guren Merritt. However, the plain language of the tail policy only requires that the claim

"arise out of" any "act, error or omission" which took place prior to the end of the policy period." The phrase "arising out of" has been construed by the Arizona Courts to merely require a causal relationship. However, causal is not to be confused with proximate cause. *Farmers Ins. Co. v. Till*, 170 Ariz. 429, 825 P.2d 954, 955 (Ct. App. 1991); *Ruiz*, 847 P.2d at 116; *Love v. Farmers Ins. Group*, 121 Ariz. 71, 588 P.2d 364, 367 (Ct. App. 1978). Thus, the use of the phrase "arising out of," does not require that the claims in the *Sun Mesa* and *Chandler Manor* cases "have been directly or proximately caused, in the strict legal sense" by Blattner's "acts, errors or omissions" at Guren Merritt. *Till*, 825 P.2d at 955.

In addition, Ms. Marson's letters of June 23, 1988; September 18, 1989 and November 1, 1989 regarding denial of the claim do not mention a required date of damage. If such "date of damage" was a determinative fact, then Marson's requests for information in her June 23, 1988 letter would be meaningless and her statements in her November 1, 1989 letter denying coverage would be a blatant misrepresentation.

Finally, Mr. Gerstman identified another CIGNA underwriter who also maintained responsibility for drafting the language of the tail endorsement at issue in this case, Mr. Angelo Gioia. Mr. Gioia testified that when the language was drafted a situation in which a lawyer may have committed acts, errors or omissions during more than one policy period was not specifically taken into consideration. Gioia further testified that the claim or incident needed to occur during the policy period and that there could have been an incident and not damages.

E. CIGNA's argument that the complaint did not include the Guren Merritt policy or firm.

The defendant also argues that plaintiffs never alleged that Blattner's conduct while at Guren Merritt was wrongful, tortious or the cause of their damages in the complaint in the underlying class actions and plaintiffs did not amend the complaint to allege claims against Guren, Merritt or Blattner for actions taken at that firm. Therefore, the defendant argues that coverage does not exist.

The duty to defend arises from the allegations in the complaint. *Paulin v. Fireman's Fund Ins. Co.*, 1 Ariz. App. 408, 410, 403 P.2d 555, 557 (1965); *Salvatierra v. National Indemnity Co.*, 133 Ariz. 16, 648 P.2d 131 (Ct. App. 1982). Thus, "somewhere within the facts **alleged or the facts as they might evolve**, there must be a potential for liability under the legal theories alleged." *Aetna Casualty & Surety Co. v. Dannenfeldt*, 778 F.Supp. 484, 499 (D.Ariz. 1991) (emphasis added). It was clear from the underlying action that the coverage theory evolved during the course of the action and thus there was a "potential for liability under the legal theories alleged in the case"—that Blattner's failure to include in the documents the life care permit requirement and lack of those permits occurred partly during his work at the Guren Merritt firm. Moreover, the undisputed facts establish that plaintiffs specifically requested coverage under the Guren Merritt policy during the underlying action and the defendant denied that coverage until after settlement of the case.

F. CIGNA's argument that the act, error or omission should be negligent.

In this case, there is a question of law as to whether the policy requires that the act, error or omission be negligent. Defendant CIGNA argues that the act, error or omission must be negligent for coverage to exist because the phrase "act, error or omission" is a universal phrase used in professional liability policies which means conduct that is the *negligent* cause of the claimant's injury. Defendant CIGNA cites one Arizona case and numerous cases from other jurisdictions. Plaintiffs argue that such interpretation is inconsistent with the plain language and history of the policy.

The Court agrees with the plaintiffs. First, nothing in the plain language of the policy requires that the act, error or omission be negligent or give rise to all elements of a tort cause of action during the coverage period. Arizona law is clear that "if an insurer desires to limit its liability under a policy, it should employ language which clearly and distinctly communicates to the insured the nature of the limitation. *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1133 (1982). In this case, CIGNA did not limit the policy by using the word negligent.

Second, CIGNA's representations to Ohio Insurance regulators and testimony regarding that language establishes that coverage exists and negligence is not required as asserted by defendant CIGNA. The prior version of CIGNA's lawyers professional liability policy sold in Ohio contained the clause "negligent act, error or omission." When CIGNA revised the policy, CIGNA changed the language to "act, error or omission," representing to the

Ohio Department of Insurance that removal of the word "negligent" was to "avoid possible restrictive interpretation." At the same time, CIGNA increased the premium by 200% "in view of the unlimited exposure" to CIGNA under the tail policy. Therefore, the defendant's definition as found in case law ignores the assurances by the insurance company to the Ohio Insurance Division that the word "negligent" was removed from the phrase "act, error or omission" in this policy to avoid a restrictive interpretation. An interpretation that added the word negligent to the policy would be directly in contrast with the meaning alleged to the Ohio Insurance Division when the word "negligent" was deleted from the phrase and the premium increased 200% to adjust for the additional liability.

Because the plain language of the policy unambiguously applies on its face to the acts errors or omissions committed by Blattner while at Guren Merritt, partial summary judgment is proper for the plaintiffs in this case.

G. Even if the language could be considered ambiguous, the Court would construe it against the defendant.

According to the Arizona Supreme Court, in the case of ambiguous language:

> In interpreting the language of the agreement in question to determine if [the insured] had a reasonable expectation of coverage . . . we must examine the purpose of the clause in question, public policy considerations, and the purpose of the transaction as a whole.

Phoenix Control Systems, Inc. v. Insurance Co. of North America, 165 Ariz. 31, 796 P.2d 463 (1990); *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989); *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 694 P.2d 181 (1984). If after an analysis of these factors, the language remains ambiguous, the ambiguous language is to be construed against the insurer and in favor of coverage. *Wilson*, 782 P.2d at 734; *Security Ins. Co. v. Andersen*, 158 Ariz. 426, 763 P.2d 246, 248 (1988); *Transamerica Ins. Group*, 143 Ariz. at 355, 694 P.2d at 184; *Cardon v. Cotton Lane Holdings, Inc.*, 124 Ariz. Adv. Rep. 3, 841 P.2d 198 (1992). In the *Darner* case, the Arizona Supreme Court addressed the parol evidence issue applicable to insurance policy disputes. The Court commented with respect to the interpretation of standardized contracts such as an insurance policy that:

> Evidence on surrounding circumstances, including negotiations, prior understandings, subsequent conduct and the like, is taken to determine the parties' intent with regard to integration of the agreement; once the court is able to decide what constitutes the 'agreement,' the evidence may be used to interpret the meaning of the provisions contained in the agreement.

Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 393, 90, 682 P.2d 388 (1984).

1. the purpose of the "act, error or omission" clause

The "act, error or omission" clause in the Guren Merritt tail policy provides the basic coverage triggering event. Thus, it is to be broadly construed in favor of

effectuating the purpose of the policy: to provide coverage. *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 694 P.2d 818, 185-86 (1984); *Almadova v. State Farm Mut. Auto. Ins. Co.*, 133 Ariz. 81, 649 P.2d 284 (1982). The purpose and history of the phrase in the policy, as discussed above, weighs in favor of the plaintiffs rather than the defendant's interpretation that negligence is required for the policy to apply.

2. Public policy

Arizona law requires that the language be interpreted according to its plain everyday meaning. *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. at 430, 641 P.2d at 1274; *Rodemich v. State Farm Mut. Auto. Ins. Co.*, 130 Ariz. at 539, 637 P.2d at 749. In this case, the plain meaning of the phrase establishes coverage. In addition, CIGNA expressly represented to the Ohio Department of Insurance that it removed the word "negligent" from the phrase "act, error or omission" to "avoid possible restrictive interpretation." Thus, public policy considerations dictate that CIGNA should be unable to propose the same restrictive interpretation that it declared to the Insurance Department that it intended to avoid.

3. CIGNA's interpretation would defeat the purpose of the tail coverage

Finally, tail coverage offers an "extended discovery" or "extended reporting" option in claims-made policies. Under such policies, the insured obtains the right to be covered for claims arising out of actions taken by the insured during the original policy period as long as the

resulting claims are reported prior to the end of the extended discovery or reporting period. Long, *The Law of Liability Insurance*, §12C.04[2] (1990); Mallen and Smith, *Legal Malpractice*, §28.11. p. 745.

CIGNA's interpretation requires that the act, error or omission and the resulting damage must all occur during the basic policy period. Thus, the tail coverage for which the Guren Merritt firm paid an additional and substantial premium would be worthless. Under Arizona law, a provision which emasculates apparent coverage will not be given effect consistent with the doctrine of reasonable expectations. *Gordinier v. Aetna Cas. & Surety Co.*, 154 Ariz. 266, 742 P.2d 277 (1987); *Do v. Farmers Ins. Co.*, 171 Ariz. 113, 828 P.2d 1254, 1257 (Ct. App. 1991). As such, the defendant's interpretation of the policy will not be adopted by this Court.

Therefore, after considering the factors in *Darner* and *Wilson* to the extent that the policy could be considered ambiguous, the Court would be required to construe the policy against CIGNA and in favor of coverage.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiffs' Motion for Summary Judgment (DOC 177) is granted.

(2) Defendant's Motion for Summary Judgment (DOC 208) is denied.

(3) Defendant's Objection and Motion to Strike the Declaration of Christopher Cavallaro (DOC 229) is granted in part and denied in part. The Motion to Strike is denied. However, the Court has considered the objection and has not included the expert opinion as part of the summary judgment ruling.

Dated this 22nd day of June, 1994.

/s/ C. A. Muecke
C.A. Muecke
U.S. District Judge

[Filed May 21, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOYCE I. OLDFATHER, individually and as Representative of a Bondholder class; EDWIN BERTRAND, individually and as Representative of a Bondholder class,	)	No. 96-15047 D.C. No. CV-91-00734-ROS
Plaintiffs-Appellees,	)	ORDER
v.	)	
CIGNA INSURANCE COMPANY, fka INA Underwriters Insurance Company,	)	
Defendant-Appellant.	)	

Before: GOODWIN, BRUNETTI, and FERNANDEZ, Circuit Judges.

Appellees' petition for rehearing and/or for certification of questions of first impression to the Arizona Supreme Court is DENIED.

ENDORSEMENT 7

In consideration of the additional premium charged it is agreed that:

1. Coverage will be provided according to the applicable terms, conditions and exclusions of this policy for all claims first made after the termination of the Policy period, arising out of any act, error or omission in rendering professional services for others in the Insured's capacity as a lawyer, which took place prior to the end of the Policy period and were caused by the Insured or any other person for whose acts, errors, or omissions the Insured is legally responsible, and are otherwise covered by the Policy.

No. 97-341

Supreme Court, U.S.
FILED
SEP 25 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

JOYCE I. OLDFATHER, Individually and As Representative of a Bondholder Class; and Edwin Bertrand, Individually and As a Representative of a Bondholder Class,

Petitioners,

vs.

CIGNA INSURANCE COMPANY, f/k/a INA Underwriters Insurance Company,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court deny the instant Petition where the Ninth Circuit's opinion turned entirely on Arizona state insurance law, there are no constitutional or federal issues presented (let alone a split of authority on such issues), Petitioners inappropriately seek this Court's review of the Ninth Circuit's fact-bound and evidentiary findings, and Petitioners misstate the facts, the law and the fundamental basis of the Ninth Circuit's opinion?

2. Did the Ninth Circuit correctly apply well-established Arizona law in ruling that there was no coverage under Respondent's professional liability policy, since the insured, Guren, Merritt, Fiebel, Sogg & Cohen ("Guren Merritt") did not commit any liability-producing conduct?

3. Did the Ninth Circuit correctly hold that liability in the underlying class actions was limited to what Robert Blattner did on the bond projects at a much later time and while at a completely different law firm, Benesch, Friedlander, Coplan & Aronoff ("Benesch"), which Respondent did not insure?

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STATEMENT OF THE CASE

This appeal concerns the Ninth Circuit's correct interpretation and application of well-established Arizona law that Respondent's professional liability insurance policy, which insured a law firm (Guren Merritt), did not provide coverage for two underlying securities' class actions commenced by Petitioners, where: that law firm was not named by Petitioners as a defendant in the underlying actions; it had not committed any liability-producing acts, errors, or omissions; it had ceased to have any involvement with the underlying transactions and issuance of bonds long before any liability-producing act, error or omission was committed by a different law firm (Benesch); and the liability-producing acts, errors and omissions were committed solely by Benesch.

As such, the instant Petition is particularly inappropriate for review by this Court for at least the following reasons:

First, this appeal turns entirely on the Ninth Circuit's correct interpretation and application of Arizona state insurance law. There is no need for this Court to determine and then review what is applicable Arizona state insurance law, and whether the Ninth Circuit correctly applied Arizona law, especially when that court has expertise and experience with Arizona insurance law. Moreover, to the extent Petitioners seek to have this Court resolve purportedly "novel" questions of Arizona insurance law, a proposition with which Respondent disagrees, Petitioners should have commenced their coverage action in state court and not in federal court. Or else, they should have sought to have certified questions of law resolved by the Arizona State Supreme Court (not this Court). Petitioners never made such a request before

the District Court. Petitioners' certification request came only *after* the Ninth Circuit rendered its opinion, and was appropriately denied by the Ninth Circuit for obvious reasons.

Second, Petitioners provide no "compelling reasons" requiring this Court's review. There are no constitutional or federal questions at issue, and Petitioners did not contend otherwise. There are no conflicts between any federal courts of appeal (or with any state supreme courts) with respect to Petitioners' state insurance law claims, and Petitioners do not contend otherwise. Indeed, this case *only* involves whether there is insurance coverage under a specific professional liability insurance policy (issued 13 years ago), under a particular set of facts and allegations which were extensively litigated before the District Court and the Ninth Circuit.

Third, the standard reasons employed by this Court in denying *certiorari* petitions apply with equal if not greater force here. The alleged errors asserted by Petitioners turn on factual and evidentiary findings that were entirely correct and appropriate, and certainly do not require this Court's valuable time and resources to re-review those factual and evidentiary submissions and rulings by the District Court and the Ninth Circuit. In addition, and perhaps in their zeal to seek review by this Court, Petitioners have misstated the legal basis for the Ninth Circuit's ruling.

Fourth, Petitioners *have* already recovered all available insurance coverage from the insurers of Benesch, and all Petitioners are seeking now is insurance provided to a different law firm (Guren Merritt) that was never named a defendant in the underlying class actions, committed no liability-producing conduct resulting in Petitioners'

alleged injury, ceased to be involved long before the key events and transactions, and was never involved in the underlying settlement *in any respect*. It is especially revealing that Petitioners state that this appeal is important to not only them, but "society at large", when in fact, the *real* beneficiary is not the underlying plaintiff classes, but the excess insurer of Benesch (Old Republic), which has financed this coverage suit, used its own lawyers to litigate this case and pursue appeals, and hopes to recover 50% of the potential $23 million sought from Respondent.

FACTS

The Underlying Chandler Manor And Sun Mesa Bond Transactions

The underlying transactions forming the basis of this insurance litigation involve tax exempt bonds issued for the construction and operation of two residential retirement communities in Mesa and Chandler, Arizona, known as the "Sun Mesa" and "Chandler Manor" projects. Guren Merritt and one of its partners, Robert Blattner, was initial co-bond counsel, but ceased to be co-bond counsel in *mid-March 1984*. At that time, Blattner left Guren Merritt to become a member of Benesch, at which time Benesch became co-bond counsel.

Prior to when Blattner left Guren Merritt in mid-March 1984, Blattner committed no liability-producing act, error or omission, but only engaged in certain preliminary activities. In stark contrast, however, much later in 1984, the Benesch firm and Blattner did commit liability-producing acts, errors and omissions, which led to them being sued in two class actions.

A. Blattner's Preliminary Acts At Guren Merritt

While at Guren Merritt, Blattner performed certain preliminary activities relating to the bond projects:

- An initial application for each bond project was submitted to the Mesa and Chandler Industrial Development Authority ("IDA"). (CR 181, p. 15; CR 211, p. 13)[1] Each IDA approved the preliminary application, contingent on more information being submitted later. Each IDA approved the applications shortly before the bond projects closed, which was after Blattner had left Guren Merritt and was at Benesch. (ER 8, p. 11; ER 14, p. 5; ER 19, pp. 6-7) At no time was any IDA approval withdrawn, and neither IDA asserted any claim against Guren Merritt or Blattner.
- An application seeking tax exemption was submitted to the IRS. (CR 181, Exs. 45-46) After Blattner left Guren Merritt and was at Benesch, the IRS approved those applications. (CR 211, Ex. A; ER 19) However, at no time did the IRS revoke its approval, or make any claims against Guren Merritt or Blattner.
- An issue of whether the projects required "life care" permits under Arizona law had surfaced before Blattner left Guren Merritt. (CR 296, Ex. 4) However, that issue was not resolved, one way or the other, while Blattner was at Guren Merritt. (CR 211, p. 13; CR 211, Ex. Q, BB, and CC; ER 2)

B. Blattner's Liability-Producing Conduct At Benesch Friedlander

In mid-March 1984, Blattner left Guren Merritt and became a partner at Benesch. At that time, Guren Merritt ceased to be co-bond counsel, and Benesch became co-

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[1] Respondent's citations to "CR" refer to docket number entries in the Clerk's Record; citations to "ER" are to the Excerpts of Record submitted to the Ninth Circuit.

bond counsel. (CR 1, pp. 3-4; CR 211, p. 13; CR 211 Ex. A, pp. 6-7; ER 19) At least the following liability-producing activities occurred while Blattner was at Benesch:

- Preliminary official statements or red herrings were distributed, in which Benesch (not Guren Merritt) was identified as co-bond counsel. (CR 296, Ex. 4, ER 2)
- Blattner prepared, signed and delivered opinion letters on Benesch letterhead (not Guren Merritt) attesting to the validity and tax exempt status of the bonds. (ER 4, 6) Copies of those bond opinions were provided to potential bond purchasers, who allegedly relied on them. (ER 14, p. 9; ER 8, p. 7)
- The prospectus-like documents for each bond project, known as Official Statements ("OSs"), were reviewed and approved by Blattner on behalf of Benesch (not Guren Merritt), and were then distributed to potential bond purchasers. (ER 3, 5, 19) Ultimately, the OSs were allegedly relied upon by the bond purchasers. Benesch (not Guren Merritt) appeared as co-bond counsel in the OSs. (*Id.*)
- On August 30, and November 30, 1984 respectively, the bond projects for Chandler and Sun Mesa closed, after which the bonds were sold. Blattner attended each closing on behalf of Benesch. (ER 14, p. 5; ER 8, ER 19, p. 3, 6-8)[2]

The Underlying Securities Class Action Litigation

A. The Class Action Complaints

The Sun Mesa and Chandler Manor projects eventually failed. In 1986 and 1987, the Sun Mesa bonds and the Chandler Manor bonds were declared in default. (CR 1,

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[2] Respondent attaches as an Appendix a chart summarizing the above undisputed facts, which compares Blattner's work on the projects while at Guren Merritt and Benesch.

pp. 5-7; ER 23) Thereafter, two separate class actions were brought on behalf of purchasers of the Sun Mesa and Chandler bonds, *Joyce I. Oldfather v. Sun Mesa Corporation, et al.* and *Bertrand v. Industrial Development Authority of City of Chandler.* (ER 8, 14) The plaintiff-classes consisted solely of those persons who had purchased bonds, complaining that they were materially misled by the OSs provided to them prior to their bond purchases. In each action, defendants were professionals and other entities involved in the preparation and dissemination of the OSs, erroneous legal opinions, and sale of the bonds to the bond purchasers. (ER 7)

Both class action complaints named *Benesch* as a defendant because of its role as co-bond counsel, pointing to work of Blattner on the projects as a member of *Benesch*. Both complaints named, as individual defendants, those Benesch partners as of the date the bonds were issued. (ER 14, p. 9-10; ER 8, p. 7-8)[3]

In contrast, the *Oldfather* and *Bertrand* complaints did *not* name Guren Merritt or any former Guren Merritt partner as a defendant.[4] Nor did the complaints specifically allege that Blattner committed any wrongful conduct at Guren Merritt. Rather, the gravamen of both

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[3] Both complaints made clear they were naming these Benesch partners as defendants "solely to permit enforcement of a judgment against their personal assets in the event that [Benesch] assets [were] insufficient to satisfy the judgement to be obtained by plaintiffs." (ER 14, p. 10; ER 8, p. 8)

[4] Not surprisingly, in response to complaints filed in *Bertrand* and *Oldfather*, answers were only made on behalf of the Benesch firm and the partners thereof who had been specifically named as defendants (ER 16); no answer was ever served or filed on behalf of Guren Merritt or any former partner of Guren Merritt. Nor did Benesch or any of its partners assert any claim against Guren Merritt or any former partners of Guren Merritt.

class action complaints was that the bond purchasers had been misled by material omissions in offering documents disseminated when the bonds were sold. With respect to Benesch, the complaints alleged:

> In connection with *disclosures to investors and the sale of the bonds*, all counsel involved in the transaction issued misleading legal opinions concerning their involvement in the preparation and review of necessary documents, the Chandler Commons project, and applicable law. The defendant law firms that *rendered opinions* that there were no material representations or non-disclosures as summarized above and below, *issued misleading legal opinions . . . Benesch Friedlander*, acting principally through its partner, defendant Robert A. Blattner, *delivered an opinion at the closing* that the bonds were valid and legally binding special obligations of the issuer and that the bonds were tax exempt. Benesch Friedlander participated in disclosures to investors and participated in the preparation and use of the prospectus. (ER 14, p. 9, 19; ER 7) (Emphasis added)[5]

In *Bertrand*, the class of bondholders sought damages predicated on their having purchased now worthless bonds. The exact same is true for the damages sought in *Oldfather*. No damages were sought in either action for any wrongful conduct happening before they had purchased the bonds.

B. The Pre-Trial Order

After all document and deposition discovery in the underlying *Oldfather* action was complete, on February

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[5] The allegations in the *Oldfather* complaint were identical in all material aspects to the *Bertrand* allegations.

20, 1991, the parties submitted a joint pre-trial order ("PTO"). (CR 211, Ex. 1, ER 19) In the PTO, Petitioners identified as defendants "Benesch and all of its partners as of November 30, 1984 including Robert A. Blattner." (*Id.* at 2) Petitioners asserted that *Benesch's* conduct was an "extreme departure" from *Benesch's* duty of ordinary care:

> *Benesch/Friedlander participated in making disclosures to plaintiffs. Through Blattner, they drafted, reviewed and approved the Sun Mesa Official Statement, which was distributed to purchasers of the Bonds, including plaintiffs* . . . [Benesch] knew and intended that the Bonds would be sold, that the Sun Mesa Official Statement was to be used in selling the bonds, that it would be distributed to the investing public, including plaintiffs, and that the investing public could and would rely on the Official Statement . . . *[Benesch] represented that the Sun Mesa Official Statement contained a fair, complete, and accurate depiction of the Sun Mesa project* . . . In preparing the Sun Mesa Official Statement, [Benesch] knew or recklessly ignored the facts that a life care permit was required . . . (*Id.* at 24-25)

Moreover, Petitioners asserted how they allegedly relied upon and were harmed by *Benesch's* conduct:

> [Benesch] prepared a fraudulent Official Statement. Plaintiffs would not have purchased the bonds but for the fraudulent admissions from the Sun Mesa Official Statement. [Benesch's] conduct proximately caused plaintiff's damages in an amount equal to the purchase price of the bonds, pre-judgment interest, attorney's fees and costs incurred . . . (*Id.* at 37)

Significantly, the *only* reference to Guren Merritt in the PTO was that Blattner (and an associate) had left Guren Merritt on March 19, 1984. (*Id.* at 6) The PTO contained

no other allegation concerning Guren Merritt, let alone one of wrongdoing.

C. The Underlying Settlement

On or about March 20, 1991, Petitioners entered a settlement agreement with Benesch, and all Benesch partners as of the dates when the bonds had been issued. (CR 181, Ex. 26, ER 20) Petitioners agreed to, among other things, settle all of their claims against Benesch and its partners, not execute on the stipulated judgments entered against Benesch or its partners, and only seek to recover the net amounts of the judgments from defendant.[6] (CR 296, Ex. 16, ER 21)

Benesch and its partners, including Blattner, assigned their rights under the Guren Merritt policy to Petitioners. (CR 296, Ex. 16, ER 21) Thereafter, all settlement-related documents referred only to "Benesch and all of its partners as of the date of issuance of the bonds, including Blattner." (CR 259, Ex. 28, ER 21-22) There were no settlement-related documents relating to Guren Merritt or its former partners.

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[6] As part of the March 20, 1991 settlement, the settling parties and Old Republic gave Respondent 5 days to contribute its $5 million limits, otherwise the settlement would be executed without Respondent and Respondent would be sued for coverage for $23 million and bad faith. (CR 181, Ex. 26, p. 6-7) However, the settlement agreement already had provided that, whether Respondent agreed to pay or not, Blattner was *not* exposed to any liability. If Respondent did *not* pay, Petitioners and Old Republic would try to hold *Respondent* liable. Knowing that Blattner would *not* be exposed to any personal liability, Respondent adhered to its no coverage position. (CR 181, Ex. 27) Through this intended "set up," Petitioners and Old Republic sought a potential $23 million windfall from Respondent.

The Insurance Policies

A. The Benesch Policies

Benesch was insured under a $5 million professional liability claims-made policy issued by Pacific Employers Insurance Company ("PEIC"), an affiliate of Respondent, effective January 19, 1987 to January 19, 1988. (CR 181, Ex. 4) Only Benesch and its partners were insured under the PEIC policy, and only for acts, errors or omissions committed at Benesch.[7]

B. The Guren Merritt Policy

Respondent insured Guren Merritt under a policy affording professional liability coverage from November 30, 1983 to November 30, 1984. For purposes of this case, the applicable limits of liability are $5 million. The insuring agreement provides in relevant part:

> To pay on behalf of the Insured[8] all sums which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured or any person for whose acts *the insured is legally liable*:

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[7] Old Republic issued an excess policy that followed form to the PEIC policy, insuring Benesch and its partners for claims made between January 19, 1987 and January 19, 1988. (CR 54, Ex. B) Old Republic took the position that all underlying coverage, including the *Guren Merritt* policy, had to be exhausted before its excess policy provided any coverage to Blattner. (CR 316, Ex. G)

[8] The policy expressly required that the professional services had to be rendered by "the Insured," which was defined as: "any *former* partner . . . acting in his professional capacity on behalf of [Guren Merritt]." (*Id.*)

> (a) *By reason of any act, error or omission* in professional services rendered or which should have been rendered by the insured. . . . (ER 1) (Emphasis added)

As initially issued, the policy required that, in order for there to be coverage, the claim had to be "first made" during the policy period. (*Id.*) However, Endorsement 7 amended the policy to eliminate the requirement that the claim had to be first made during the policy period. Endorsement 7 provided in relevant part:

> (1) Coverage will be provided *according to the applicable terms, conditions and exclusions of this* policy for all the claims first made after the termination of the policy period, arising out of any act, error, or omission in rendering professional services for others in the insured's capacity as a lawyer, which took place prior to the end of the policy period and were caused by the insured or any other person for whose acts, errors, or omissions the insured is legally responsible, and are otherwise covered by the policy. . . (*Id.*) (Emphasis added)

The sole purpose and effect of Endorsement 7 was to eliminate the requirement that a claim first be made during the policy, which was obtained by Guren Merritt when it dissolved in June 1984.

C. The Claims For Coverage

1. Under The PEIC Policy

Immediately after institution of the underlying class actions, Benesch and its partners, including Blattner, demanded that PEIC defend and indemnify them under the PEIC policy. (CR 181, Ex. 5) Without disputing coverage, PEIC acknowledged its obligation to defend and appointed a leading Phoenix firm (Jennings, Strouss & Selman) to defend. (CR 181, Ex. 6) Much later, when the

actions were being settled, PEIC paid its $5 million limits of liability.

2. Under The Respondent's Policy

For two years after the underlying class actions were commenced, no one ever gave notice or made any demand for coverage under Respondent's Guren Merritt policy. During that time, Benesch and its partners, including Blattner, were defended by Jennings Strouss (under the PEIC policy).

However, in May 1988 Benesch submitted a claim for coverage to Respondent, contending that Respondent's Guren Merritt policy provided coverage for the same claims asserted against Benesch and its partners. (ER 9, 10) After considering the request, analyzing the terms of its policy, and investigating relevant facts, Respondent declined coverage under the Guren Merritt policy. (ER 11, 15, 18) Simply put, there was no coverage *under the Respondent's policy* because Blattner had not committed any liability-producing act, error or omission while at Guren Merritt; rather, his liability in the two class actions stemmed from what he did while at Benesch.

The District Court's Erroneous Coverage Order

On May 17, 1993, Petitioners moved for partial summary judgment contending that the Guren Merritt policy provided coverage for the $23 million settlement of the claims against Blattner. (CR 177, 180-181, 221-223) Petitioners claimed that Blattner had committed acts, errors or omissions while at Guren Merritt, contending it was irrelevant whether any such act, error or omission resulted in liability against Blattner. (*Id.*) On or about August 20, 1993, Respondent opposed Petitioners' summary judgment motion and moved for summary judgment on all counts in Petitioners' complaint. (CR 211-215,

227-228, 233) Respondent asserted that the Guren Merritt policy did not afford coverage because Blattner had not committed any liability-producing act, error and omission at Guren Merritt. (*Id.*)

On June 24, 1994, without a hearing, the Honorable Carl A. Muecke of the United States District Court of Arizona issued an order granting Petitioners' motion and denying Respondent's motion. (ER 27; Petitioner's Appendix ("Pet. App.") 6-46)[9] In its coverage analysis, the District Court interpreted the phrase "act, error, omission" according to its "ordinary meaning and effect", finding that Blattner had merely committed "acts" while at Guren Merritt. (*Id.* at 29-30)

However, after making these findings, the District Court did *not* analyze whether Blattner's alleged liability in the underlying class actions was "by reason of" or "arose out of" such conduct. Rather, the District Court held that there was *no* requirement that the alleged acts or omissions must result in liability. (*Id.* at 36-37)

By order dated November 28, 1995, the District Court (Hon. Roslyn O. Silver, the current presiding judge) reversed a prior order denying 28 U.S.C. § 1292(b) certification, and allowing Respondent an immediate interlocutory appeal of the District Court's prior coverage ruling. (ER 28)[10]

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[9] In rendering 21 pages of detailed findings, the District Court reviewed, weighed and evaluated conflicting evidence presented by each side. In several instances, the District Court expressly noted that it had done so. (*See* June 24, 1994 order at pp. 5 n.2, 7, 8, 9, 10 n.6.; ER 27)

[10] In the 1292(b) order, the District Court stated that Respondent had a "substantial likelihood of success on the merits," expressing "serious doubts" about the "correctness" of the coverage ruling, and noting that the coverage ruling was

The Ninth Circuit's Opinion

In reversing summary judgment for Petitioners, the Ninth Circuit, Justices Goodwin, Brunetti and Fernandez presiding, expressly set forth in its unanimous opinion numerous undisputed material facts that supported summary judgment for Respondent.

The Ninth Circuit determined that the complaint failed to identify any conduct by Blattner "that created liability" under the Guren Merritt policy; "nor have the bondholders added additional allegations on summary judgment to bolster their contention." (Pet. App. at 3) The Ninth Circuit also found that Petitioners initially filed suit against Blattner, his then current firm Benesch and others for losses arising out of defaults on the bonds; and that a cause of the default, according to Petitioners, was the failure to obtain life care permits. (*Id.* at 2)

The Ninth Circuit noted that, while Blattner was at Benesch, the OSs prepared by Blattner "neglected to disclose the need for and absence of life care permits." (*Id.* at 2, 4) Moreover, the court found that Petitioners relied upon the OSs issued *by Benesch* in electing to invest in the facilities. (*Id.*) The Ninth Circuit also noted that Blattner prepared, signed and delivered opinion letters on Benesch letterhead attesting to the validity of the bonds and their tax exempt status; the bondholders received copies of those opinion letters when they invested.

The Ninth Circuit then applied the undisputed facts to Respondent's policy, noting that before there could be any coverage, Blattner had to be "legally obligated to pay damages . . . *by reason of* any act, error or omission in rendering professional services while he was at Guren Merritt." (*Id.* at 3) The Ninth Circuit stated the phrase "by

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"contrary" to the common interpretation of the phrase "act, error, and omission" in the insurance industry. (*Id.* at 2-3)

reason of" required some causal nexus between Blattner's activities at Guren Merritt and his *liability* to the bond purchasers. In other words, the Ninth Circuit found that the policy language required that Blattner had to have committed a "liability-creating" act, error or omission while at Guren Merritt in order to trigger coverage. (*Id.*)

Additionally, the Ninth Circuit acknowledged that the Extended Reporting Period Endorsement (Endorsement 7), *by its own terms*, did not expand coverage. The court stated that use of the phrase "arising out of" in Endorsement 7 "did not expand the scope of coverage" and thus, "did not advance the bondholders' argument beyond their primary contention that Blattner acted illegally while at Guren Merritt." (*Id.* at 4-5)

Based on these undisputed facts, the Ninth Circuit applied well-established Arizona insurance law in support of its no coverage opinion. The Ninth Circuit initially held that the District Court committed reversible error in ruling that Blattner's conduct at Guren Merritt constituted an "act, error or omission" sufficient to trigger coverage under the Guren Merritt policy. (*Id.* at 2) Most significantly, the Ninth Circuit ruled that Petitioners presented *"no evidence"* that Blattner engaged in any liability-producing act, error or omission while at Guren Merritt, stating:

> [Petitioners'] deficiency [in failing to allege liability producing conduct of Blattner at Guren Merritt] is fatal to the bondholders' case . . . *Without evidence* Blattner committed some liability creating "act, error or omission" while at Guren Merritt, the bondholder's simply have no claim. (*Id.*)

Moreover, the Ninth Circuit ruled that Petitioners were wrong as a matter of law in attempting to assign liability for Blattner's legal services at one law firm,

which resulted in allegedly faulty documents issued by a second law firm, stating "we cannot equate the liability-creating act of issuing a disclosure statement with the preliminary act of discussing the requirements for such a document." (*Id.* at 4)

Indeed, the Ninth Circuit recognized that this case is *predicated* upon Blattner's failure to disclose (while he was at Benesch) that the project required life care permits. (*Id.* at 4) The Court thus noted that Blattner's "act, error or omission" could not occur until he failed to make the necessary disclosure in the OSs, "an event which occurred after he left [Guren Merritt]." (*Id.*) Accordingly, regardless of Blattner's culpability, the Ninth Circuit held that Guren Merritt cannot, as a matter of law, be held liable "for actions undertaken after Blattner left their employ"; necessarily, the Ninth Circuit held that the bondholders' claim must fail. (*Id.*)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE STATE LAW ISSUES RAISED BY THE PETITION ARE INSUFFICIENT TO INVOKE THIS COURT'S CERTIORARI JURISDICTION

This Court has long recognized that the ultimate responsibility for determining state law resides not with it, but with the highest courts of the states. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, where reasonable arguments have been advanced to support a determination of state law by a federal court of appeals, this Court has found it "wholly unprofitable for [us] to analyze [the state] cases on point." *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949). It has thus become the policy of this Court to "accept and therefore [not review] the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

See, Frankfurter, *The Business of the Supreme Court at October term 1933*, 48 Harv. L. Rev. 238, 269-270 (1934) ("[t]he Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it"). Indeed, this Court has frequently deferred to the views of a court of appeal as being those of an "expert" tribunal concerning the laws of states within its circuit. *See, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

The Petition should therefore be denied because the Ninth Circuit was entirely correct in ruling that, under Arizona insurance law, there was and can be no coverage under Respondent's professional liability policy. The Ninth Circuit properly recognized that Respondent's policy did not provide coverage unless the insured committed a *liability-producing* act, error or omission during the policy period. (Pet. App. at 3) As noted above, the Ninth Circuit found that, as a matter of law, Guren Merritt had not committed any such act, error or omission – indeed, Guren Merritt was not even sued in the underlying class actions. Thus, since the Ninth Circuit found *"no evidence"* of any liability-producing act, error or omission by Blattner while at Guren Merritt, there simply was no coverage, and Petitioners thus had no claim.

In addition, the Ninth Circuit correctly determined that, as a matter of Arizona law, the so-called "tail" endorsement (Endorsement 7) did not "expand" coverage, except to allow coverage for a claim that was first made after the policy expired. More importantly, the court recognized that Endorsement 7 did not, as Petitioners contended, "expand" coverage for acts, errors or omissions that were *not liability producing*. Rather, as Endorsement 7 expressly provided, the court held that in

order for there to be coverage, the same fundamental requirements of the policy must be met.[11] Petitioners

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[11] Respondent presented the Ninth Circuit with numerous authorities, including leading insurance treatises, stating that the sole purpose and effect of an extended discovery period endorsement, such as Endorsement 7, was only to eliminate the requirement that the claim had to be made during the policy period. *See, New England Ins. Co. v. Sylvia*, 783 F. Supp. 6, 7 (D. N.H. 1991) ("[i]t is noted that the extension relates only to the reporting period and not the coverage period"); *Taub v. First State Ins. Co.*, 44 Cal. App. 4th 811, 818, 52 Cal. Rptr. 2d 1, 5 (Ct. App. 1995) ("[Extended Claims Reporting Period] provision allows [insured] to seek coverage for his claim *assuming that the policy otherwise covers this claim*") (emphasis added); *Langley v. Mut. Fire, Marine & Inland Ins. Co.*, 512 So.2d 752, 753 (Ala. 1987) ("optional extension of coverage . . . would have continued [insured's] coverage . . . for claims based on acts or omissions that occurred during the primary term") (emphasis added); *Employers Reins. Corp. v. Fireman's Fund Ins. Co.*, 95 N.J. 1, 468 A.2d 421, 423 (N.J. 1983) ("[under extended reporting endorsement] coverage is *not* extended to claims made after [the policy period] if the act giving rise to that claim also occurs after that date"); *See also*, 2 Long, *The Law Of Liability Insurance*, § 12B04[4] at p. 12B-85; § 12C.04[2] at p. 12C-60; § 12B04[4] at p. 12B-85 § 12C.04[2] at p. 12C-60 (1989) ("extended reporting provisions merely allow the insured to report claims for a stated period after the expiration date of the policy. They do not cover claims arising out of acts occurring after the expiration date of the policy . . . It should be noted that the purchase of the extended reporting period coverage *does not increase the scope of coverage* under the policy) (emphasis added); *See also* 3 *New York Insurance Law*, § 40.03 [2] at p. 40-7 n.14 (1991) ("extended reporting period coverage does *not* extend the time during which the act, event or occurrence out of which the claim arises must have happened") (emphasis in original); Hanen, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 So.Tex.L.Rev. 75, 85 (1992) ("[S]ome legal malpractice insurance policies provide that an insured may purchase an additional period of time in which to report claims under their

failed to refute any of Respondent's legal authorities concerning the purpose and effect of Endorsement 7, and they are unable to demonstrate that the Ninth Circuit's interpretation of Endorsement 7 was incorrect.

Likewise, there is no reason for this Court to review the Ninth Circuit's correct application of indisputable facts and well-established securities law. As a matter of law and undisputed fact, the Guren Merritt firm was not and could not be liable where it was *not* a named defendant in the underlying class actions, had *not* committed any liability-producing act, and had *ceased* to have any involvement with the underlying transactions when the liability-producing acts were committed.

In addition, the sale of bonds to the classes, which is a *sine qua non* to a securities claim, took place more than a half year *after* Guren Merritt had ceased to have any involvement with the projects.[12] It was undeniable that Guren Merritt had no involvement at the time the bonds were sold. Furthermore, the Ninth Circuit properly ruled that because Blattner did not prepare or disseminate any opinion letters to potential bond purchasers while at Guren Merritt, he could not have had any liability as a partner of that firm as a matter of law. As Respondent

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policy . . . These extensions are called extended reporting endorsements or 'tail' coverage").

[12] *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975) ("one asserting a claim for damages based on the violation of Rule 10(b)5 must either be a purchaser or seller of securities"); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 649-650 (9th Cir.), *cert. denied*, 493 U.S. 1002 (1989) ("to prevail on a cause of action for violation of [Rule 10(b)5], the investors must establish fraud in connection with the purchaser's sale of any security"); *Ohashi v. Bert Indus.*, 536 F.2d 849, 853 (9th Cir.), *cert. denied*, 429 U.S. 1004 (1976) ("no 10(b)-5 liability where alleged fraud was not in connection with the inducement nor concurrently with the exchange [of the security]").

demonstrated below, absent any opinion or representation to the bond purchasers, Blattner had no fiduciary obligation or duty to disclose material information while at Guren Merritt.[13] Thus, the Ninth Circuit correctly held that the opinions of bond counsel upon which the classes relied were issued by Benesch, on Benesch letterhead; Guren Merritt had *nothing* to do with the bond opinions, issued almost half a year after Guren Merritt no longer was involved in the projects.

The Ninth Circuit also properly determined that, as a matter of law, whatever preliminary activities were done by Guren Merritt (while it was bond counsel) were *not* liability-producing and certainly were *not* the basis of the bondholders' claims. (Pet. App. at 4) The best example is that the bondholders complained about a failure to disclose in the prospectus-like Official Statements that certain life care permits had not been obtained and were necessary to make the projects viable. However, as the Ninth Circuit observed, Guren Merritt had nothing to do with the preparation and dissemination of the Official Statements; rather, it was Benesch (and Blattner at

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[13] *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988) ("[s]ilence, absent a duty to disclose, is not misleading under 10(b)5"); *Chiarella v. United States*, 445 U.S. 222, 229, 231 (1979) (" '[t]he party charged with failing to disclose market information must be under a duty to disclose it' . . . There can be no fraud absent a duty to speak"); *Ackerman v. Schwartz*, 947 F.2d 841 (7th Cir. 1991) (attorney could not evade responsibility to disclose "to the extent he permitted promoters to release his opinion letter to investors' agents"); *Schatz, supra*, 943 F.2d at 494 ("an attorney is rarely liable to any third parties for his or her legal work unless the attorney has prepared a signed 'opinion' letter designed for use by a third party").

Benesch) which approved those Official Statements.[14] Additionally, the Ninth Circuit properly rejected Petitioners' argument that Blattner could have been liable for "aiding and abetting" an alleged securities law violation, merely because he performed preliminary work at Guren Merritt.[15]

Moreover, the Ninth Circuit held that Blattner could not have been liable as a Guren Merritt partner because, while at Guren Merritt, he made no representations to the

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[14] Respondent presented the Ninth Circuit with ample authorities establishing that, since no Official Statement was issued or delivered to any bond purchasers while Blattner was at Guren Merritt, he could not have been liable to the bond purchasers for what he did at Guren Merritt. *See, e.g., Williams v. Sinclair*, 529 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 426 U.S. 936 (1976) ("because investor purchased shares follow[ing] his receipt of the *prospectus*, the transactional nexus between the alleged fraud and the loss" was met). *See also, Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir.), *cert. denied*, 503 U.S. 936 (1992) ("no rule 10(b)5 liability law firm where "[it] did not solicit any purchase of securities or *prepare any solicitation documents*") (emphasis added).

[15] *See, Schatz, supra*, 943 F.2d at 497 ("when a lawyer offers no legal opinions or affirmative misrepresentations . . . and merely acts as a scrivener . . . a lawyer cannot be liable [as an] aider and abettor"); *Camp v. Dema*, 948 F.2d 455, 463 (8th Cir. 1991) (aiding and abetting liability under 10(b)5 rejected for attorneys' "*routine actions* . . . necessary to consummate the sale of stock") (emphasis added). Moreover, the United States Supreme Court has since held that there is *no* private cause of action for "aiding and abetting" a violation of Rule 10(b)-5. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439, 1448 (1994) ("[W]e cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive").

bond purchasers upon which they could have or did in fact rely.[16] (Pet. App. at 4)

II. CONTRARY TO WHAT PETITIONERS CONTEND, THERE ARE NO "COMPELLING REASONS" WARRANTING THIS COURT'S REVIEW

A. There Are No Constitutional Or Federal Issues

The Petitioners did not raise, nor have they attempted to raise, any constitutional or federal issues warranting this Court's review. Rather, the Petition improperly seeks this Court's review of the Ninth Circuit's reasoned application of Arizona state law. Since the Petition raises no constitutional or federal law issues, the Court should deny the Petition.

B. There Are No Other "Compelling Reasons"

The Petition should also be denied because there are no other "compelling reasons" warranting this Court's review. The standard factors this Court considers in determining whether "compelling reasons" exist include whether the court of appeal's decision conflicts with another court of appeals on the same matter, or has

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[16] Again, Respondent presented the Ninth Circuit with numerous authorities in support of this fundamental requirement. *See, e.g., Affiliated UTE Citizens v. United States*, 406 U.S. 128, 153-54 (1971); *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 788 (9th Cir. 1980) ("substantial reliance is necessary for recovery in a 10(b)-5 case"); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2nd Cir. 1987) (securities fraud claim required "reasonable reliance on the representation, causing damage to the plaintiff").

decided an "important federal question" in conflict with a state court of last resort.[17]

Here, there is no conflict between two different courts of appeal (or with a state supreme court) with respect to any of the state law insurance issues resolved by the Ninth Circuit, and Petitioners certainly did not contend there was any. Nor did Petitioners demonstrate any conflict with or deviation from Arizona insurance law. In fact, as explained herein, the Ninth Circuit opinion was demonstrably correct in its interpretation and application of Arizona law.

There is no support in the record or elsewhere for Petitioners' contention that this is a case of "major national importance" to financial offerings. (Pet. at 15) Prior to seeking review by this Court, Petitioners had never stated or intimated that this particular case was of "major national importance." Indeed, it is fair to say that Petitioners always viewed and treated this case as a "garden variety" insurance coverage and bad faith action to be resolved under Arizona law. One will search the record in vain to find anything where Petitioners stated that this case would have significance outside the confines of Arizona. Their belated and self-serving plea of "major national importance" is a transparent effort to convert this case into something which it plainly is not.

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[17] Indeed, this Court's 1980 amendments to its own rules reflect the Court's lack of interest in reviewing diversity cases where, as here, the only issue is an alleged inconsistency (which Respondent disputes) between the court of appeals' decision and the applicable substantive state law. (Omitting the factor that the court of appeals resolved "an important [state] question in a way in conflict with applicable [state] law").

Similarly, Petitioners raise the false cry that this case will "greatly impact" how other professional liability insurers will act. (Pet. at 15) Never before have Petitioners made that assertion. They provide this Court with no specifics or details for such a proposition, since obviously there is none. This case involves a professional liability insurance policy issued more than thirteen years ago with unique policy language. The Ninth Circuit determined there was no coverage based on that language and the particular facts at issue. It is hard to see how this action catapults itself to "national prominence" in *today's* insurance field. Certainly, Petitioners provide no explanation.[18]

III. THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS INAPPROPRIATELY SEEK THIS COURT'S REVIEW OF EVIDENTIARY AND FACTUAL FINDINGS, AS WELL AS MISSTATE THE BASIS OF THE NINTH CIRCUIT'S RULING, THE FACTS AND THE LAW

The Petition should also be denied because Petitioners improperly seek this Court's review of factual and evidentiary findings. As this Court held in *United States v. Johnston*, 268 U.S. 220, 227 (1925), *certiorari* proceedings are not the appropriate vehicle "to review evidence and

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[18] Perhaps the most compelling basis why this Court should reject the purported reasons advanced by Petitioners is that, undeniably, the instant coverage action is really an action by a different professional liability insurer (Old Republic) seeking to make a profit on its having insured Benesch, since it stands to recover 50% of the over $23 million being sought from Respondent. Old Republic has financed this case, pursued it with its own lawyers, has filed the instant Petition through its attorneys and constantly invokes the guise of appearing as the underlying classes.

discuss specific facts." *See also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 (1981) (cross-petition presenting "primarily question of fact . . . does not merit Court review"); *Rudolf v. United States*, 370 U.S. 269 (1962). Indeed, under this Court's standard procedure, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." (SC Rule 10(a)).

Moreover, the Petition misstates the fundamental basis of the Ninth Circuit's opinion, the relevant facts and the law, and therefore should be denied.

A. The Petition Misstates The Basis Of The Ninth Circuit's Opinion

Petitioners wrongly claim that the Ninth Circuit's interpretation of the policy was contrary to the "very purpose of the tail endorsement." (Pet. at 2) According to Petitioners, Endorsement 7 had the effect of expanding coverage beyond that afforded by the policies' basic insuring agreement, given that Endorsement 7 uses the phrase "arising out of", while the insuring agreement uses "by reason of." (Pet. at 17-18)

In rejecting Petitioners' premise of coverage, the Ninth Circuit correctly held that, under Arizona law, the well-established meaning, purpose and effect of Endorsement 7 required that Blattner's liability to the bondholders had to be "by reason of" (not merely "arise out of") a liability-producing act, error or omission while at Guren Merritt. (Pet. App. at 3, 5) Petitioners also mischaracterize how the Ninth Circuit arrived at its opinion by claiming that the panel "did not even attempt" to determine whether the language in the tail endorsement was "ambiguous" under Arizona law. (Pet. at 25-30) In fact, the Ninth Circuit expressly rejected this argument,

noting that "Endorsement 7's *plain language clearly does not expand the scope of coverage beyond the original policy.*"[19]

B. The Petition Misstates The Facts

Petitioners also misstate the facts by contending that "the scheme to defraud investors was hatched while Blattner was at Guren Merritt." (Pet. at 8) As properly recognized by the Ninth Circuit, however, Petitioners presented "no evidence" of any liability-creating conduct of Blattner while at Guren Merritt.[20] (Pet. App. at 4)

Petitioners also grossly mischaracterize the life care permit issue, stating that Blattner "had knowledge" of the life care permit "requirement" while he was at Guren Merritt. (Pet. at 9) Substantial evidence in the record and Respondent's main brief below demonstrated that the issue of life care permits had just surfaced, and was undetermined at the time Blattner left Guren Merritt for Benesch. More importantly, however, the Ninth Circuit recognized that the "life care" permit issue was only relevant because the OSs – *disseminated to the bond purchasers while Blattner was at Benesch* – failed to disclose the alleged requirement for life care permits, and the investors relied on those omissions. (Pet. App. at 4) (See

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[19] Petitioners further misstate that the Ninth Circuit "ignored" certain extrinsic evidence purporting to show that CIGNA "recognized" there was coverage. (Pet. at 27-30) The Ninth Circuit did not "ignore" such extrinsic evidence; the court was presented with ample, unrefuted authorities by Respondent confirming that such "evidence" was both inadmissible and irrelevant.

[20] To the extent Petitioners claim there was a "scheme to defraud" while Blattner was at Guren Merritt, that claim is frivolous, since as a matter of law and public policy, there can be no insurance for such conduct. *See, e.g., Standard Fire Ins. Co. v. Peoples Church of Fresno*, 985 F.2d 446, 448-51 (9th Cir. 1993).

attached Appendix) Thus, in determining that the life care issue was wholly irrelevant for purposes of whether Blattner's Guren Merritt conduct was liability-producing, the Ninth Circuit stated:

> [Petitioners] do not contend that Blattner issued the Official Statements which failed to include the life care requirements until after he left Guren Merritt . . . Blattner's act, error, or omission could not occur until he failed to make the necessary disclosure in the Official Statements, an event which occurred after he left Guren Merritt. (Pet. App. at 3-4)

Petitioners also wrongly contend that the Ninth Circuit "was required, yet failed, to engage in an analysis of case law on insurance contract construction." (Pet. at 25-26) Petitioners have no evidence to support this claim. Indeed, as explained above, the Ninth Circuit expressly analyzed the plain meaning of the policy language, giving Endorsement 7 its well-established meaning and effect. Respondent also presented the Ninth Circuit with numerous authorities that there was no "conflict" or "inconsistency" between Endorsement 7 and the policy, all of which support the Ninth Circuit's construction of the policy.

C. The Petition Misstates The Law

With no authorities to support their position, as the Ninth Circuit noted, Petitioners nonetheless insist that the Ninth Circuit "nullified" the very purpose of Endorsement 7, because the language of the tail (i.e., "arising out of") controls over the language of the insuring agreement ("by reason of"). As noted above (see fn. 11, *supra*), ample case law and other authorities, as well as Petitioners' own concessions at oral argument, refute

Petitioners' interpretation of Endorsement 7 before this Court.[21]

In addition, Petitioners misstate the law by suggesting that Blattner could have been liable to the bondholders for what he did at Guren Merritt. (Pet. at 19-24) Petitioners principally rely on a single case, *Cronin v. Midwestern Oklahoma Develop. Authority*, 619 F.2d 856 (10th Cir. 1980), in asserting that Blattner engaged in "liability creating" acts at Guren Merritt. As Respondent asserted below, however, *Cronin* is distinguishable because, in that securities fraud case, the court merely held that summary judgment in favor of an attorney was prematurely granted; there was no determination of *liability* against the attorney. As Respondent demonstrated below, numerous decisions from this Court, the Ninth Circuit and elsewhere confirm that, *as a matter of law*, Blattner could *not* have been liable to the bond purchasers because of anything he did at Guren Merritt. (*See* attached Appendix; discussion Point I, *supra*, at pp. 16-22)

IV. THE NINTH CIRCUIT'S RULING PROPERLY VOIDED AN UNJUST WINDFALL FOR PETITIONERS

The Ninth Circuit properly reversed the District Court's coverage ruling, which would have resulted in a windfall for Petitioners and Old Republic. As part of the March 20, 1991 settlement, the settling parties and Old Republic gave Respondent 5 days to contribute its $5

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[21] Indeed, Petitioners' counsel conceded at oral argument before the Ninth Circuit panel that Petitioners' position on why coverage exists was *not* dependant upon Endorsement 7 purportedly expanding the scope of coverage. (*See March 13, 1997 Transcript of Oral Argument to Ninth Circuit*, JJ. Goodwin, Brunetti and Fernandez presiding, at pp. 29-30, 36).

million limits, otherwise the settlement would be executed without Respondent and Respondent would be sued for coverage for the stipulated $23 million judgments, bad faith, and punitive damages. However, at that time, the settlement agreement already had provided, whether Respondent agreed to pay or not, that Blattner was *not* exposed to any liability.

If Respondent did not pay, Petitioners and Old Republic would try to hold Respondent liable. Knowing that Blattner would not be exposed to any personal liability, Respondent adhered to its no coverage position. Through this intended "set up," Petitioners and Old Republic sought an undeserved, potential $23 million windfall from Respondent, which the Ninth Circuit properly reversed.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests the Court to deny the instant Petition for grant of a writ of *certiorari*.

Dated: September 25, 1997

Respectfully submitted,

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APPENDIX

Guren Merritt | **Mid-March 1984** | **Benesch Friedlander**

1984	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
IDA Approval	Feb. 1 Applications submitted Feb. 8 Approval for Chandler Feb. 16 Preliminary IDA approval granted for Sun Mesa				June 6 Blattner requests amended resolution from Chandler IDA June 12 Amended Sun Mesa application filed June 15 Amended IDA resolution re: Chandler	July 11 Amended Chandler IDA Application filed July 25 Final IDA resolution for Chandler			Oct. 11 Final IDA resolution for Sun Mesa		
Tax Exempt Status		Mar. 16 501(c)3 applications filed		May 22 Tax exemption granted re: Sun Mesa							
Life Care Applications		Mar. 6 Issue first surfaces	Apr. 10 Blattner tells Clark and Liberatore to investigate "necessity of Life Care permits" Apr. 26 Liberatore asks Drummond to apply for Life Care permits		June 28 Blattner asks Clark about state of Life Care permits				Oct. 12 Chandler application filed by Drummond	Nov. 28 Deficiency letter from Arizona DOI	
Preliminary Official Statements (POS)		Mar. 24 Furby begins drafting POS Mar. 28 Due diligence meeting: initial draft of POS discussed		May 17-18 Due diligence meeting: Discussion of next draft of POS	June 1 POS Chandler	July 1 POS Chandler July 25 Final printed POS Chandler	Aug. 1 Draft POS Sun Mesa		Oct. 9 Final printed POS Sun Mesa		
Official Statements Disseminated							Aug. 16 Chandler Official Statement			Nov. 30 Sun Mesa Official Statement	
Issuance of Bond Opinions							Aug. 30 Blattner's Bond Opinion for Chandler			Nov. 30 Blattner's Bond Opinion for Sun Mesa	
Sale of Bonds to Investors							Aug. 30 Chandler bonds sold			Nov. 30 Sun Mesa bonds issued	

1985 Bonds go into default